INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 21

MARIO DIBELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 93–114) is reported at 284 F. 2d 897. The opinion of the district court (R. 81–89) is reported at 178 F. Supp. 5.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1960 (R. 115). The petition for a writ of certiorari was filed on December 9, 1960, and was granted on February 20, 1961 (R. 116; 365 U.S. 809). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an order denying a motion to suppress filed before indictment is independently appealable, where the motion is directed solely at the suppression of evidence (primarily contraband narcotics) for use at a forthcoming trial and was filed after the criminal complaint, the waiver of preliminary hearing, and the binding over of the movant for grand jury action.

2. Whether, assuming the order was appealable, the arrest of petitioner was lawful and the search and seizure of narcotics incident to that arrest were reasonable.

STATUTES INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

26 U.S.C. 7607 provides in pertinent part:

> The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 (1) of the Tariff Act of 1930, as amended; 19 U.S.C. sec. 1401 (1)), may—
>
> * * * * *
>
> (2) make arrests without warrant for violations of any law of the United States relating

> to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

STATEMENT

On March 9, 1959, petitioner was arrested on a charge of violating the federal narcotics laws (R. 21–22). The following day, he was arraigned before a United States Commissioner, informed of the charge against him, and, having waived preliminary hearing, was released on bail and bound over for action by the grand jury (R. 23–24). Thereafter, on June 17, 1959, petitioner moved in the United States District Court for the Eastern District of New York to suppress, "in any criminal proceeding," evidence seized at the time of his arrest (R. 3–6). Before this motion was heard or decided by the district court, an indictment was returned against petitioner charging him with federal narcotics violations (R. 94). On November 30, 1959, the district court issued an order denying the motion, without prejudice to its renewal at the trial (R. 90).[1] The court of appeals held the order appealable (R. 94) and affirmed on the merits, finding that the arrest was lawful and the search and seizure incident to it were reasonable (R. 93–105).

---

[1] The opinion of the district court in support of this order was entered on November 4, 1959 (R. 81–89).

The pertinent facts relating to the arrest and the subsequent search and seizure may be summarized as follows:[2]

1. Starting in the latter part of July 1958, David W. Costa and Daniel W. Moynihan, agents of the Bureau of Narcotics, commenced an investigation into the suspected narcotics activities of petitioner (R. 25, 28). During the course of this investigation, agent Moynihan, posing as a narcotics buyer, met Samuel Panzarella who agreed to sell him a quantity of heroin (R. 29). At 6:00 in the morning of August 26, 1958, the agent met with Panzarella in Manhattan. Panzarella informed the agent that he wanted to telephone his source of supply. Following this call, Moynihan was told that the delivery of the heroin would take place at 8:30 a.m. (R. 29). Panzarella and Moynihan then drove to Jackson Heights, Queens, and parked on 79th Street, north of Roosevelt Avenue (R. 29).

Suspecting that petitioner was Panzarella's source of supply, agent Costa had kept petitioner's home in Jackson Heights under surveillance in the early morning of August 26th. At 7:30 a.m., Costa observed petitioner leave his home and enter a Chrysler automobile, New York license number 69 71 NE, and drive to 37th Avenue and 79th Street, Jackson Heights (R. 26).

After Panzarella left his car, agent Moynihan observed him walk to 79th Street and 37th Avenue and

[2] At the hearing on the motion, the district court heard oral argument by counsel (R. 53-80), and accepted opposing and supporting affidavits (R. 8-31, 32-52).

enter a Chrysler car bearing New York license number 69 71 NE (R. 29). Agent Costa also saw Panzarella enter petitioner's automobile, and followed them. They drove to 79th Street and Roosevelt Avenue where Panzarella left the car (R. 26). Both agents saw Panzarella leave the automobile and walk directly to 78th Street (R. 26, 29). Under Costa's observation, Panzarella then met agent Moynihan, who was awaiting his return. Panzarella handed the agent a small glassine envelope containing "white powder" (R. 27, 29). Subsequent tests of the "white powder" revealed it to be an ounce of heroin (R. 26, 29).

Agent Moynihan arranged a second purchase of heroin from Panzarella for September 10, 1958 (R. 26, 29). Moynihan and Panzarella met in Manhattan at 9:30 that evening, and Panzarella stated once again that it would be necessary to drive to Jackson Heights to meet his "connection" (R. 29–30). At 9:40 p.m. Panzarella placed a telephone call to his "connection" (R. 30), and then drove with Moynihan to 74th Street and Roosevelt Avenue in Jackson Heights (R. 30). Agent Costa, who was again stationed at petitioner's home, saw him leave at 11:00 p.m., and walk to 74th Street and Roosevelt Avenue (R. 26). At 11:05 p.m. Panzarella left Moynihan in the parked automobile (R. 30). Both agents observed Panzarella and petitioner meet and walk together from 74th Street to 37th Road (R. 26, 30). Shortly thereafter (11:30 p.m.), Panzarella returned to the automobile, and, enroute back to Manhattan, handed agent Moynihan a glassine envelope containing

a "white powder," later found to be heroin hydrochloride (R. 30). Panzarella told Moynihan that petitioner was his source of supply and had supplied the heroin sold to Moynihan on August 26th (R. 30).

No tax stamps were attached to the two envelopes containing narcotics that were sold to agent Moynihan on August 26 and September 10; and these narcotics were not sold pursuant to a written order form (R. 30).[3]

2. On October 6, 1958, agents Costa and Moynihan applied for a nighttime search warrant for petitioner's apartment on the basis of their affidavits setting forth the above facts (R. 25–31). On that same date, Commissioner Abruzzo denied the application (R. 9, 51–52, 73).[4]

---

[3] These facts are essentially a summary of the affidavits of agents Costa and Moynihan which were submitted by the government in support of its application for a warrant to search petitioner's apartment (R. 25–31; see also R. 72–73).

[4] While this record does not show the ground for the Commissioner's denial of the application for a search warrant, it was apparently, as the United States Attorney suggested at the motion hearing, "denied for failure to show the time concerned" (R. 73). The officers were seeking a nighttime warrant, but their affidavits did not allege they were "positive that the property is * * * in the place to be searched * * *" (Rule 41(c), F.R. Crim. P.). They alleged only that they had probable cause to believe that narcotic drugs were concealed in petitioner's apartment (R. 25, 28). The magistrate may have concluded that an insufficient showing had been made for the issuance of a nighttime search warrant under Rule 41(c), F.R. Crim. P., although, under 18 U.S.C. 1405(2), dealing specifically with narcotics, probable cause is enough whether the warrant is to be served during the day or night.

Thereafter, on October 15, 1958, Commissioner Epstein issued a warrant for petitioner's arrest,[4] based upon the complaint of agent Costa, charging petitioner with the sale of heroin on September 10, 1958 (R. 21–22, 63, 73). The complaint stated that the sources of the agent's knowledge were his "personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics" (R. 7). For some unexplained reason, the detailed affidavits which were submitted by agents Costa and Moynihan to Commissioner Abruzzo on the application for a search warrant and which were on file in the Commissioner's office were not directly submitted to Commissioner Epstein on the application for an arrest warrant (R. 13, 72).

3. The arrest warrant, issued on October 15, 1948, was not used to arrest petitioner until March 9, 1959. As the Assistant United States Attorney explained at the hearing on the motion to suppress, the lapse of time between the procurement of the arrest warrant and petitioner's arrest was due to the fact that the agents were trying "to find out who else was associated with * * * DiBella in the narcotics traffic * * *" (R. 75–76; see also R. 17). On March 9, 1959, at approximately 8:15 p.m., agent Costa and two other federal narcotics agents (O'Connor and Murray), armed with the arrest warrant, went to DiBella's apartment to arrest him (R. 8, 76). Shortly before, the agents

[4] Through inadvertance the warrant of arrest was dated October 6, 1958 (see R. 73–74, 82).

had seen from a neighboring building that petitioner was at home. The agents rang the bell of the apartment and the door was opened by petitioner's stepdaughter (R. 9, 76). The officers immediately identified themselves, showed her their credentials, and were ushered into the apartment (R. 9, 76). The agents then identified themselves to petitioner, and showed him and his wife a copy of the warrant of arrest, which they both read (R. 9–10, 76–77). Two other agents then entered the apartment (R. 10). At this juncture, in response to an inquiry as to whether he would permit the agents to search the apartment, petitioner replied (R. 10, 77):

> I know what you came for. I have all the stuff in a suitcase in the closet. There's no use tearing the place apart.

Petitioner then led the agents to a closet in his bedroom. Agent Costa removed a brown suitcase from the floor of the closet and opened it. The suitcase contained approximately a pound of heroin, a quantity of cocaine, and certain paraphernalia used to "cut" narcotics (R. 10, 77). The agents requested that petitioner and his family take possession of the valuables which included a box containing $2,675.00 (R. 10). Agent O'Connor thereafter found $6,000 in cash in a shoebox hidden in a closet in petitioner's bedroom (R. 10). Later that same day, petitioner admitted that these funds represented profits earned in the sale of narcotics. He further admitted having been in the narcotics business over a period of years

and tentatively identified his source of supply (R. 10).*

4. In his opinion denying the moton to suppress, Judge Rayfiel found: (1) that the arrest warrant was properly issued (R. 82–86); (2) that, in any event, the agents had probable cause for petitioner's arrest (R. 86–89); and (3) that the search and seizure incident to that arrest were reasonable (R. 89).

The court of appeals held that "the complaint upon which the warrant of arrest was based was deficient * * * and would not support the warrant of arrest which was issued under it" (R. 97). The court of appeals, however, agreed with the district court that probable cause justified petitioner's arrest (R. 98–103), and that the search and seizure which followed the arrest were reasonable (R. 105). The court specifically rejected the contention that the lapse of time from the initial existence of probable cause (September 1958) until the arrest (March 1959) affected the validity of the arrest. "[W]e do not believe," the court said, "that the delay eradicated from Costa's mind the knowledge that he had received by

* The foregoing facts concerning petitioner's arrest and the seizure of narcotics at his apartment are taken from the affidavit of the Assistant United States Attorney, submitted at the hearing on the motion to suppress (R. 8–20), and his oral presentation at that hearing (R. 75–77). An affidavit submitted to the motion judge by petitioner's counsel gave another version of the search (R. 34; see also R. 95–96, note 1): "About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agents."

614117—61——2

September, 1958, of [petitioner's] apparent violations of the narcotics laws" (R. 104). Judge Waterman, dissenting, concluded that the arrest warrant was invalid, that there was no probable cause to support the arrest of petitioner without a warrant, and that, in any event, the arrest could not be relied upon to support the search of petitioner's apartment (R. 105–114).

SUMMARY OF ARGUMENT

I

Until recently, it has been assumed that the question of the appealability of an order determining a motion to suppress turned on whether the motion was filed before or after an indictment was returned. We submit, however, that this standard is contrary to the general principles which condemn fragmentary appeals and allow appeal from a nonterminal order only when the matter at issue is, in a realistic and practical sense, independent from and collateral to the criminal case.

A. The appeal of a tentative or incomplete decision, particularly in a criminal case, has usually been considered inconsistent with the fair and orderly administration of justice. "Finality as a condition of review [has been] an historic characteristic of federal appellate procedure * * *. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick* v. *United States*, 309 U.S. 323, 324, 325–326.

Undoubtedly, the finality rule is not a rigid, unyielding formula. Important rights, largely separate and discrete from the main cause, and finally disposed of in a collateral proceeding (including certain orders relating to the suppression of evidence) may well warrant immediate review even though the main case has not finally terminated. See *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541. But this determination is to be made in light of the long-standing rule that intermediate review is the unusual, the exceptional, result. See *Carroll* v. *United States*, 354 U.S. 394.

B. Employing these principles, this Court in *Cogen* v. *United States*, 278 U.S. 221, held that an order denying a motion to suppress made after indictment, but before trial, was interlocutory and not appealable. The determination as to the appealability of suppression orders, the Court said, depended ultimately on the "essential character" of the motion "and the circumstances under which it is made." The Court, however, went on to say that an order deciding a motion to suppress is separate and appealable where "the motion is filed before there is any indictment or information against the movant * * *" (*id.* at 225). We submit that this broad statement in *Cogen*, on an issue not directly before the Court, did not fully describe the law at that time, and is not consonant with the underlying rationale of the more recent decisions of this Court.

1. The Court in *Cogen* relied, in stating that the time of the indictment was determinative, on the decisions of this Court in *Perlman* v. *United States*, 247 U.S. 7, and *Burdeau* v. *McDowell*, 256 U.S. 465.

These rulings were again followed in *Go-Bart Co.* v. *United States*, 282 U.S. 344. The facts and holdings of these three cases do not support the sweeping rule that the mere fact that no indictment has been returned when the motion is filed automatically establishes the appealability of the resulting order.

a. All three cases involved situations in which it was claimed that the government had no right to get or retain custody of the property in issue. In none of them was the Court required to consider whether the situation would be different where the motion related to contraband to which the moving party could assert no proprietary or possessory claim. This is a critical factor, for when the defendant cannot get property back his only interest is the effect of the order on the use of evidence at a criminal trial. In such a case, just as with other rulings relative to the admissibility of evidence, appeal should await final judgment.

b. Moreover, to the extent that there was uncertainty in *Perlman* and *Go-Bart* as to whether a criminal action would ever be brought, the situation here is distinguishable. In this case an indictment has been returned and it is clear that there will be a criminal prosecution; if petitioner is ultimately convicted, the ruling on the motion to suppress can be reviewed.

c. *Perlman* suggests that the order on the motion to suppress was appealable because the evidence could be used against the movant before the grand jury. This rationale would mean that, once a motion to suppress was brought, the government should be restrained from using the evidence in any way until

its right to do so had been fully determined. The result would obviously be to put a premium on dilatory tactics and lengthen the already considerable time needed to try criminal cases. Moreover, such a rule is inconsistent with the holdings of this Court forbidding judicial review of the evidence considered by the grand jury, since the defendant is fully protected by the exclusion of such evidence at trial. *E.g., Lawn* v. *United States,* 355 U.S. 339. In any event, under this rationale, even if the motion to suppress is filed before indictment, the reason for allowing an appeal would end with indictment. Since the order of the district court here came after indictment, the order in this case would not be appealable.

2. Considerations which no longer obtain were present, at least implicitly, in the early cases which seemingly laid down the time of return of the indictment as the governing factor of appealability. First, there was the desire to uphold the legal propriety of the motion to suppress, which was in its infancy as a remedy at the time of *Perlman* and *Go-Bart.* This was in part achieved in many cases by recognizing the appealability of the order, regardless of whether it was an integral part of the criminal case. At present, this remedy is well recognized and codified by Rule 41, F.R. Crim. P. Second, there was the possibility that, unless the order was immediately subject to review, principles of *res judicata* would apply to preclude later review. But, as this Court has recently made clear, the *res judicata* effect of an order depends, like its appealability, on practical considerations, *i.e.,* its relationship to and effect on a par-

ticular case. *United States* v. *Wallace, Co.*, 336 U.S. 793. Where a motion to suppress affects only the use of contraband at a criminal trial, its practical impact is simply that of a procedural step in the criminal case.

Moreover, we believe that this Court in *Carroll* v. *United States*, 354 U.S. 394, and *United States* v. *Wallace, supra*, rejected the mechanical return-of-the-indictment test of appealability. In both these decisions, this Court stressed those basic considerations emphasized in *Cogen*—that the "'essential character and the circumstances under which it is made' determine whether a motion is an independent proceeding or merely a step in the criminal case."

3. Following the decisions in *Carroll* and *Wallace*, the Fourth and Fifth Circuits have indicated that the time of the return of the indictment is not the determining factor in deciding the appealability of an order or a motion to suppress, even if the motion is brought before indictment. We submit that the more flexible view taken by these decisions not only best accords with the policy against piecemeal appeal but retains the essence of the total-circumstance approach of *Cogen* and conforms to the more recently expressed views of this Court.

C. The circumstances of this case demonstrate that the motion to suppress was simply a procedural step in the main criminal case.

1. The motion to suppress asked only for the suppression, in any criminal proceeding, of the material seized. Thus, the sole purpose of the motion was to prevent the use of evidence in the criminal case, a

purpose which demonstrates that the motion was in no way independent of the criminal case. When the motion does not ask for the return of the property seized (or the movant indisputably has no right to return, such as of narcotics), we submit that, regardless of when a motion is filed, it is never a separate proceeding which may be separately appealed.

2. Even if orders determining motions which do not ask for the return of property are sometimes appealable, they should not be appealable when they are filed after the start of the criminal case. The motion here was made after petitioner's arrest, the filing of a criminal complaint, the waiver of preliminary hearing, and the binding over of the movant for grand jury action. In short, petitioner filed his motion at a time when the criminal proceeding was running its normal course. Moreover, the motion was heard and decided after the indictment was returned, and the motion judge considered the proceeding as an integral part of the criminal case, specifically ruling that the order of denial was without prejudice to its renewal at trial. Only by disregarding these factors and making the return of the indictment the sole standard of appealability is there any basis for holding this order appealable.

II

A. We do not challenge the ruling of the court of appeals that the warrant for petitioner's arrest was not supported by a sufficiently specific affidavit. It is well established, however, that if an arrest is based on an invalid warrant the arrest is still legal if based

on probable cause. *E.g. United States* v. *Rabinowitz,* 339 U.S. 56, 60. Here, as both courts below held, there was clearly probable cause for petitioner's arrest.

B. The Fourth Amendment does not require that an arrest be made immediately after the arresting officer obtains probable cause. Numerous relevant law-enforcement considerations, such as the investigation of possible confederates, play a significant role in the decision as to when "to close the trap." Delay does not, in and of itself, show an insidious or sinister police purpose. In this case, all the indications in the record support the conclusion that the delay was reasonably motivated by a desire to determine who were petitioner's associates in the narcotics traffic.

C. 1. The Fourth Amendment does not require that law enforcement officers, proceeding on probable cause, obtain an arrest warrant if they have the time to obtain one. The history surrounding the adoption of the Fourth Amendment shows that the power to arrest without a warrant—unlike the power to search without a search warrant—preceded the development of the warrant procedure, and it was never intended that this power be supplanted by the warrant procedure. The claim that a warrant of arrest must be obtained by a constable if there was time for him to obtain one was specifically raised and rejected in the English case of *Davis* v. *Russell,* 5 Bing. 354 (1829). This ruling was followed in early American

cases where the courts similarly held that an arrest warrant need not be obtained even though there was time to obtain one. The principle of these early cases has been reaffirmed by this Court in *Trupiano* v. *United States,* 334 U.S. 699, 704–705, 708; *United States* v. *Rabinowitz,* 339 U.S. 56, 60; and *Abel* v. *United States,* 362 U.S. 217. In *Jones* v. *United States,* 357 U.S. 493, the Court cast some doubt on this principle where entry was accomplished by *force.* Here, however, the entry was wholly peaceable.

2. The statute which authorizes narcotics agents to arrest on probable cause (26 U.S.C. 7607) imposes no limits on this power merely because there is time to get a warrant. The legislative history shows that the purpose of Congress was to confirm that narcotics agents have the common-law power of peace officers, which includes the power to arrest on probable cause without a warrant. While it is true that Congress was concerned that this legislation make plain that narcotics agents are authorized to act in emergencies, there is no support for the claim that Congress meant to limit the agents' right of arrest without a warrant only to this situation. The courts of appeals that have dealt with this statute have uniformly recognized this authority to arrest without a warrant, even if the arrest does not immediately follow the officer's knowledge of the facts giving rise to probable cause.

D. Even if we assume, *arguendo,* that arresting officers are generally required to get a valid arrest warrant if they have time to do so, the failure to get a

valid warrant in this case did not render the arrest illegal.

The substantive protection afforded by the Fourth Amendment against unlawful arrests is the same whether the arrest is made with or without a warrant. If probable cause is lacking where either method of arrest is used, the arrest is invalid. Thus, the purpose of a rule requiring officers to get an arrest warrant would not be to impose a higher qualitative standard on officers making arrests; instead, the essential purpose of such a rule would be to require officers to obtain the determination of *judicial* officers that they have probable cause, rather than to make the decision on their own.

If this would be the rationale of a rule requiring officers to get arrest warrants if they have time, we submit that, even under that rule, the arrest here was lawful. This Court has held that, if an arrest is made on the basis of a warrant and the warrant proves to be defective, the arrest is nevertheless legal when based on probable cause. The arresting officer in this case procured an arrest warrant from a Commissioner—precisely the act the rule would be intended to encourage. The officer could not be expected to review the Commissioner's decision and seek a new warrant. The fact that the warrant was technically defective because the supporting affidavit did not sufficiently spell out the probable cause is basically harmless since the arresting officer did, in fact, have probable cause. There can be no sufficient purpose in penalizing the government and ultimately the pub-

lic merely because an officer and the Commissioner have made a nonprejudicial error.

E. There is nothing in this case to indicate that the arrest was made in bad faith or as an excuse to search, or that it was otherwise invalid. The officers, even though not required to do so, obtained a warrant for petitioner's arrest. While the arrest warrant was invalid since, through inadvertance, an officer failed to submit all the information at his disposal to the issuing Commissioner, this error certainly does not indicate bad faith.

Nor is there evidence that petitioner was arrested as a subterfuge to search his home. The denial of the officers' application for a search warrant does not show that the arrest was a subterfuge to search. From what appears in the record, the warrant was denied because the officers made a mistake in relying on Rule 41(c), F.R. Crim. P., rather than 18 U.S.C. 1405(2), which would have justified the issuance of a nighttime warrant. Moreover, the Commissioner did not decide the issue whether the officers had probable cause to arrest at the time he denied the search warrant; and as we have seen, the officers did in fact have adequate information.

The place, method, and time of arrest were also completely reasonable. Petitioner's apartment was the most likely place for the agents to find him. They entered these premises in a wholly peaceable manner and, when petitioner appeared, immediately placed him under arrest. The arrest at 8:15 p.m. was a

reasonable evening hour. See, *e.g.*, *Abel* v. *United States*, 362 U.S. 217, 234–236.

F. It has long been established that a reasonable search of premises under the control of a person arrested on probable cause without a warrant is valid under the Fourth Amendment. See *Agnello* v. *United States*, 269 U.S. 20, 30; *Carroll* v. *United States*, 267 U.S. 132, 158; cf. *Weeks* v. *United States*, 232 U.S. 383, 392. This Court has recently reaffirmed this doctrine. *Harris* v. *United States*, 331 U.S. 145, 151; *United States* v. *Rabinowitz*, 339 U.S. 56; *Abel* v. *United States*, 362 U.S. 217, 236.[1]

The search and seizure in this case were reasonable, whether or not one accepts the government's version that petitioner readily consented to the search. The scope and duration of the search did not approach the duration or intensity of the searches upheld in *Harris* and *Agnello*, *supra*; there was neither the indiscriminate ransacking of a whole house as in *Kremen* v. *United States*, 353 U.S. 346, 349–359, nor the sweeping seizure of private papers as in *United States* v. *Lefkowitz*, 285 U.S. 452. The officers sought and seized only the instrumentalities and fruits of the crime for which petitioner was arrested—narcotics, the tools for its use, and the profit of its traffic.

---

[1] The differences in view expressed by various members of this Court in search and seizure cases has stemmed, not from the absence of an *arrest* warrant, but from divergent opinions as to the permissible scope of search and the legality of seizure (without a search warrant) incident to a lawful arrest, whether pursuant to an arrest warrant or on probable cause.

ARGUMENT

I

THE ORDER OF THE DISTRICT COURT DENYING PETITIONER'S MOTION TO SUPPRESS WAS NOT APPEALABLE

It had generally been assumed, until recently, that the appealability of orders on motions to suppress was governed by whether the motion was brought before or after indictment. That was the test applied below. To the extent that an order on a motion to suppress is treated as final, the government could probably appeal from the granting of the motion, as well as the movant from its denial. See *Burdeau* v. *McDowell*, 256 U.S. 465. It might therefore be said to be in the interests of the prosecution to take a broad view of appealability. We believe, however, that the indictment test is not consonant with the general principles disfavoring fragmentary appeals, and that appeals from nonterminal orders should be allowed (unless Congress has otherwise provided) only when the matter at issue is, in a realistic, practical sense, independent of the main cause. The decisions of this Court which were deemed to make the return of the indictment the crucial factor seem to us to have been interpreted more broadly than their actual holdings or their particular facts require. Furthermore, the rationale of those decisions has been to a considerable extent weakened by subsequent rulings of this Court.

Above all, we believe that undue confusion and delay would result from permitting appeals from de-

nials of motions to suppress merely because they were brought before indictment—and that this would far outweigh any potential loss to the prosecution resulting from its inability to review decisions which it believes have erroneously granted motions to suppress. The impact of such a rule would be to encourage a race between the potential defendant and the government to file a paper first: the motion to suppress on the former's part, the indictment on the prosecution's part. More important, if the order on any motion made before indictment were appealable the result would be to increase the already considerable time necessary to try criminal cases. This delay would interfere seriously in the proper and expeditious administration of criminal justice. The longer the delay the more the memory of witnesses for the defense, as well as for the prosecution, is likely to be weakened; indeed, witnesses may no longer be available at all. For this and other like reasons, it is clearly of great importance that, when the alleged crimial has been arrested, the trial be conducted as soon as possible after the events on which it is based. We believe, therefore, that interlocutory appeals delaying the trial should not be encouraged; they should be allowed only where the matter is clearly separate from the criminal case.

Accordingly, we submit that the order of the district court denying petitioner's motion under Rule 41(e), F.R. Crim. P., to suppress evidence at his forthcoming trial was not a final appealable order. It was not

sufficiently removed from, or collateral to, the main stream of the criminal case to be considered other than an interlocutory segment of that proceeding. Though the indictment was not returned against petitioner until after he had filed his motion to suppress—the indictment was returned before the hearing and the order of denial—all of the other relevant circumstances surrounding the suppression proceeding support the conclusion that the motion was simply a procedural step in the defense of a criminal charge and therefore was not independently appealable.

In supporting this contention, we discuss, first, the general principles governing the determination of whether an order can be deemed sufficiently final to be appealable, and, second, the application of those principles to orders on motions to suppress, in the light of the decisions of this Court. We will then turn to the particular facts of this case which we think show that the order on the motion to suppress was merely a step in a criminal proceeding and therefore was not appealable until after final judgment.

A. FRAGMENTARY APPEALS ARE NOT FAVORED

The appeal of a tentative or incomplete decision, particularly in a criminal case, has been considered incompatible with the fair and orderly administration of justice. "Finality as a condition of review [has been] an historic characteristic of federal appellate procedure." *Cobbledick* v. *United States,* 309 U.S. 323, 324; see also *Parr* v. *United States,* 351 U.S. 513, 518–519; *Heike* v. *United States,* 217 U.S. 423, 428–

429; *McLish* v. *Riff*, 141 U.S. 661, 665; cf. *Carroll* v. *United States*, 354 U.S. 394, 399, 403–404, 406, 414–415.

In the *Cobbledick* case, *supra*, this Court held that an order denying a motion to quash a subpoena *duces tecum* was not a final decision within the meaning of Section 128(a) of the Judicial Code, which was the predecessor of the provision involved in this case (28 U.S.C. 1291, *supra*, p. 2). Both statutes permit an appeal to the courts of appeals only from "final decisions" of the district courts. The Court in *Cobbledick* explained the rationale underlying the concept of finality in criminal cases as follows (309 U.S. at 325–326):

> Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harrassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1899 was there review as of right in criminal cases. An ac-

> cused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal.

The finality doctrine is not, however, a rigid theoretical formula of fixed content or easy application.[8] Important rights, largely separate and discrete from the main cause, and finally disposed of in a collateral proceeding (including certain orders relating to the suppression of evidence) may warrant immediate review even though the main case has not finally terminated. In *Cohen* v. *Beneficial Loan Corporation*, 337 U.S. 541, this Court held appealable an order of the district court refusing to apply a state statute requiring the plaintiff in a stockholder's derivative action to give security for the defendant's reasonable expenses in connection with the action (*id.* at 546):

---

[8] An early definition of finality often relied on is that a decree is final for the purposes of an appeal "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, I.M. & S.R.R. Co.* v. *Southern Exp. Co.*, 108 U.S. 24, 28–29. But judicial definitions of finality have not been entirely consistent. See Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539, 540.

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Thus, the question turns largely on the nature of the specific order, judged in relation to the case as a whole. In a practical realistic sense orders must possess "sufficient independence from the main course of the prosecution to warrant treatment as plenary orders." *Carroll* v. *United States, supra,* 354 U.S. at 403.

At the same time, it is established that the determination whether an order is final and therefore appealable must be made in light of the general, long-standing rule that intermediate review is the unusual, the exceptional, not the favored result. As this Court recently pointed out in *Carroll* v. *United States, supra,* 354 U.S. at 403:

> The instances [of intermediate appeal] in criminal cases are very few. The only decision of this Court applying to a criminal case the reasoning of *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541, held that an order relating to the amount of bail to be exacted falls into this category. *Stack* v. *Boyle,* 342 U.S. 1.

Only when the independent nature and immediate importance of the order is clear, should there be a departure from the normal pattern which leaves review to the appeal from a final judgment on the merits.

B. WHETHER THE INDICTMENT IS RETURNED PRIOR TO THE FILING OF A MOTION TO SUPPRESS IS NOT THE STANDARD, IN ITSELF, AS TO THE APPEALABILITY OF AN ORDER DETERMINING THE MOTION

The general principles discussed above have long been recognized as applicable to orders on a motion to suppress. In *Cogen* v. *United States*, 278 U.S. 221, the Court held that an order denying a motion to suppress evidence filed after indictment, but before trial, was interlocutory and not appealable. The overall standard, the Court said, depended in the final analysis on the "essential character" of the motion "and the circumstances under which it is made." *Id.* at 225. In explaining its ruling, the Court delineated some of the criteria which it considered significant in deciding whether an order on a motion to suppress was or was not independently appealable. Among the factors which it mentioned as indicating that the proceeding would be separate and appealable were:

(1) where the independent and equitable nature of the summary proceeding is manifest (*Essgee Co.* v. *United States*, 262 U.S. 151);

(2) where the application is made by a stranger to the main litigation (*Ex parte Tiffany*, 252 U.S. 32; *Go-Bart Co.* v. *United States*, 282 U.S. 344);

(3) where the criminal proceeding is pending in another court (*Dier* v. *Banton*, 262 U.S. 147);

(4) where the motion is not filed until the criminal case is finally terminated (*Dickhart* v. *United States*, 16 F. 2d 345 (C.A. D.C.));

(5) where the particular statutory scheme under which the application is brought renders the proceeding plenary in nature (*Steele* v. *United States No. 1*, 267 U.S. 498).

In cases in which these criteria are applicable, the separate nature of the motion to suppress is almost self-evident. Therefore the application of these principles has not, with few exceptions, proved troublesome. Orders which fall within the categories listed above have almost invariably been held appealable.*

The particular problem which this case presents and the problem on which a conflict of circuits has developed stems from still another criterion mentioned in *Cogen, i.e.*, that the order is separate and appealable "wherever the motion is filed before there is any indictment or information against the movant, like the motions in *Perlman* v. *United States*, 247 U.S. 7 and *Burdeau* v. *McDowell*, 256 U.S. 465 * * * " (278 U.S. at 225). We do not believe that this single-line description of the law on an issue not directly before the Court is conclusive in a case arising over thirty years later. We submit that this is particularly true since, as we will show, this was too broad a generalization in view of the state of the law at the time; recent decisions of this Court and of the courts of appeals have cast further doubt on its correctness.

1. The time of indictment has never been, in itself, the test of the appealability of all motions to suppress.

* However, in *United States* v. *Koenig*, 290 F. 2d 166, petition for a writ of certiorari pending, No. 93, this Term, the Fifth Circuit held that an order suppressing evidence in a district other than that of trial was not final and appealable.

The statement in the *Cogen* case that an order on a motion to suppress is appealable "wherever the motion is filed before there is any indictment or information against the movant" was expressly based on the Court's prior decisions in *Perlman* v. *United States,* 247 U.S. 7, and *Burdeau* v. *McDowell,* 256 U.S. 465. These rulings were again followed, after *Cogen,* in *Go-Bart Co.* v. *United States,* 282 U.S. 344. Analysis of the facts of those cases indicates that it is too broad an interpretation of their holdings to read them as ruling that the mere fact that no indictment has been returned automatically establishes appealability.[10]

a. The *Perlman, Burdeau,* and *Go-Bart* cases all involved situations where the claimants asserted an interest in property which was not contraband, and claimed either a right to immediate return of the property or substantially similar relief. In *Perlman,* the documents in issue had been produced in a civil suit which had been concluded with the condition that the exhibits should remain impounded in the custody of the clerk and the evidence should be perpetuated for use in future cases between the parties to the civil action and their privies (see 247 U.S. at 9). When the United States sought to have the exhibits released to a grand jury to consider whether Perlman had committed perjury, Perlman, who claimed ownership of the exhibits, sought to have such use barred as violating his privilege against self-incrimination. In holding that Perlman had standing to bring the motion,

[10] In addition, as we will discuss below (pp. 37–43) considerations entered into the decisions which are no longer valid in view of later decisions of this Court.

this Court pointed out that the "Government was not one of those for whom the use of the exhibits was reserved," but that it was exercising governmental authority (*id.* at 12). In other words, although Perlman (undoubtedly in view of the impounding order) had relinquished a claim to have the property returned to him, the situation, as between Perlman and the government, was the same as it is in the more usual case where a defendant seeks return of property which it is claimed the government has no right to retain in its possession. If Perlman's contentions had been correct, the exhibits although not given back to Perlman would remain in court for use only by the parties to the equity suit and would not have been available to the prosecution for any purpose. Similarly, *Burdeau* v. *McDowell*, 256 U.S. 465, 470, involved a government appeal from the granting of a motion for return of "books, papers, memoranda, correspondence and other data" being held by the government for presentation to the grand jury. And *Go-Bart* v. *United States*, 282 U.S. 344, where the denial of a motion to surpress was held appealable, also involved private papers and memoranda.

Thus, the three early decisions of this Court, which were assumed to have laid down the broad rule that orders on motions to suppress brought before indictment are automatically appealable, involved situations in which it was claimed that the government had no right to get or retain custody of the property at issue. In all these cases the property involved was not contraband. In none of them was the Court re-

quired to consider whether the situation would be different where the motion related to contraband, to which the moving party could make no claim, and where the motion could therefore have no purpose other than the suppression of evidence in a criminal proceeding.

We think that whether the defendant does or does not have a right to claim return of property (or as in *Perlman* the equivalent) is a very significant factor on the question of appealability. To take a simple illustration, where a defendant claims the right to the return of $10,000, he would sustain an immediate, practical deprivation of property rights if his right to the money must await indictment and, possibly, criminal trial and appeal.[11] The right to the use of the money is itself important. But where the defendant cannot get any property back, whether his motion to suppress is granted or denied, his only interest is the effect of the order on the use of the evidence at a criminal trial. In that situation, it seems to us—just as in the case of other rulings relative to evidence to be used at a trial—that appeal should await final judgment.[12]

---

[11] Even in that situation a motion brought *after* indictment is not normally appealable. Presumably, the rationale is that, if a defendant waits until after indictment, his main interest is not in return but in suppression. See *Cogen* v. *United States*, 278 U.S. 221. It should be noted, however, that this Court in *Cogen* recognized that, even after indictment, the proceeding might be sufficiently discrete to be appealable. *Id.* at 226. See also *United States* v. *Ponder*, 238 F. 2d 825 (C.A. 4).

[12] In two recent cases, we have articulated the government's view that there is an important distinction between a motion

b. It is true that in *Perlman,* in dealing specifically with the question of the finality of the order denying the motion to suppress rather than Perlman's standing, this Court did not rest on the nature of the property. Instead, the decision was seemingly based on the fact that, if not prevented, the evidence would be used against Perlman "in a proceeding not yet brought and depending upon it to be brought." The opinion stated that the Court could not agree that Perlman "was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way." 247 U.S. at 13. In that situation, there was as yet no criminal proceeding instituted against Perlman even in the form of a complaint. Similarly, the Court in *Go-Bart* v. *United States, supra,* 282 U.S. at 356, in holding

---

for the return of property brought before indictment and a motion involving contraband where the motion, although brought before indictment, is only to suppress the use of evidence. *United States* v. *Murphy*, 290 F. 2d 573 (C.A. 3), pending on petition for a writ of certiorari, No. 317, this Term (see the government's brief in opposition, p. 4, note 1); *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2), certiorari denied, 366 U.S. 944 (see the government's brief in opposition, No. 908, Oct. Term 1960, pp. 8–9). In those cases, we said that where the motion is for the return of objects in which the defendant has a substantial property interest ($20,100 in *Carlo* and four hundred bags of sugar, a hand truck, dock ramp, tractor-trailer, and $3,846 in *Murphy*) and is made before indictment, the order is appealable. On the other hand, if the objects seized have no substantial property value (for example, a document not needed for business or other purposes) and return is clearly sought to prevent use at trial, we think that the order is not appealable—at least if the motion is made after a complaint beginning the criminal case has been filed. For a more complete discussion, see *infra*, pp. 46–51.

appealable an order denying petitioner's application for return and suppression of personal books and papers, stated that "[w]hen the application was made, no information or indictment had been found or returned," and that "[t]here was nothing to show that any criminal proceeding would ever be instituted." [13] To the extent that there was uncertainty in those cases as to whether a criminal action would or would not be brought, the situation is distinguishable from that here. In this case, an indictment has been returned and it is clear that there will be a criminal prosecution. Therefore, if petitioner is ultimately convicted the ruling on the motion to suppress can be reviewed.[14]

c. The *Perlman* decision suggests that the order denying the motion to suppress was appealable because the evidence could be used against the movant before

[13] Although the motion in *Go-Bart* was filed after petitioner's arrest and arraignment, nothing had been done thereafter to expedite the criminal proceedings. The hearing in the district court had been postponed on several occasions, and at the time of this Court's decision—about a year and a half after arraignment—no further action had been taken (see 282 U.S. at 350).

[14] The Fifth Circuit has made the same distinction between cases where it was clear a criminal proceeding would be brought and those where there was considerable doubt. In *Zacarias* v. *United States*, 261 F. 2d 416, certiorari denied, 359 U.S. 935, the court held that the complaint and preliminary hearing were the commencement of a criminal case and therefore motions to suppress made after that time but before indictment were not appealable (see *infra*, pp. 44–45). On the other hand, the Fifth Circuit has held that orders on motions to suppress brought before there had been a preliminary hearing on a specific charge were appealable. *White* v. *United States*, 194 F. 2d 215 (C.A. 5), certiorari denied, 343 U.S. 930; see also *Foley* v. *United States*, 64 F. 2d 1 (C.A. 5).

the grand jury. The holding was so interpreted in *Cobbledick* v. *United States*, 309 U.S. 323, 328–329:

> Perlman's exhibits were already in the Court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality, a means of denying Perlman any appellate review of his constitutional right.

This idea has persisted in some later decisions. See *In re Fried*, 161 F. 2d 453, 458 (C.A. 2); *United States* v. *Sineiro*, 190 F. 2d 397 (C.A. 3); *Freeman* v. *United States*, 160 F. 2d 69, 70 (C.A. 9). If, as these cases indicate, the underlying rationale for holding that an order denying a motion to suppress is appealable is that a defendant has the right to keep the evidence from being considered by a grand jury, that rationale applies even where the motion is directed to contraband. On that theory, a defendant has the right to appeal an order which would allow the evidence to go before the grand jury and presumably the government has the right to appeal an order denying it that right.

This rationale has on the surface a neat logic which may be appealing, but in practical application we think it creates more problems than it solves. Its net result would be to open the door to long delays in criminal prosecutions which would far outweigh the

protection afforded defendants. Moreover, it is unsatisfactory and unfair to determine whether an order on a motion to suppress is appealable on the basis of whether the indictment was returned before the ruling on the motion or the appeal. Grand juries sit with greatly varying frequency in different parts of the country, and we do not think that the appealability of a order on a motion to suppress ought to depend on the happenstance whether the government can obtain an indictment before the court rules on the motion to suppress. Rather, if the mere possible return of an indictment on the basis of illegally obtained evidence were so great an injury that an order permitting evidence to go before a grand jury should be deemed independently appealable, logic would require that where the motion to suppress is denied, the government should not be permitted to use the evidence until its right had been finally determined. Such a ruling, however, would put an even greater premium on dilatory tactics and would almost inevitably result in unnecessary appeals from denials of motions to suppress and prolong the already lengthy period needed to try a criminal case.

This Court has recognized that defendants are not allowed to challenge the evidence which is considered by the grand jury. Thus, in *Costello* v. *United States,* 350 U.S. 359, the Court refused to allow a defendant to challenge his indictment on the ground that it was supported only by hearsay evidence. In *Lawn* v. *United States,* 355 U.S. 339, this holding was applied to a situation involving the alleged use by the

grand jury of evidence which was unconstitutionally obtained. The district court had held that the obtaining of certain records from the defendant violated his privilege against self-incrimination. The defendant claimed that this evidence had been used by the government in securing an indictment and asked for a full hearing on this allegation, which was refused. This Court affirmed, rejecting the idea that defendants can challenge indictments on the ground that illegally obtained evidence was presented to the grand jury. Quoting from *Costello*, the Court said (355 U.S. at 350):

> "It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."

An appeal concerning evidence which may in the future be used by a grand jury, like the hearing involved in *Lawn*, is an attempt to impose technical rules on the grand jury and would result in indeterminable delay. If evidence which was in fact illegally obtained is used at the trial, it can of course be challenged on appeal and the conviction can be reversed. It therefore seems to us that, where a motion to suppress can have for its purpose only the

prevention of the use of seized property as evidence, the appealability of the order should not depend on whether the evidence might be used by the grand jury; the issue should be determined at the trial, subject to appeal from final judgment.

In any event, if the rationale for allowing appeals from orders denying motions to suppress is that appeal is necessary to prevent use by the grand jury of illegally obtained evidence, the reason for allowing the appeal would end with the return of the indictment even if the motion to suppress is brought before indictment. In that case the rule should be that, even if a motion to suppress is brought before indictment, the order is not appealable if an indictment is returned before the ruling on the motion or pending appeal. If this rule were applied to the instant case, the order denying suppression was clearly not appealable since the indictment was returned before the order was issued.

2. Even if the time of indictment was once the standard of appealability, it is not and should not be the standard today.

a. Considerations which formerly supported a broad view of the appealability of orders on motions to suppress are no longer pertinent.—The early decisions of this Court which were assumed to lay down as the test of appealability the time of the return of the indictment seem to us to have at least implicitly involved considerations which are no longer pertinent. The motion to suppress on Fourth Amendment grounds was in its infancy as a legal remedy at the

time of *Perlman* and *Go-Bart*, and even later. "Independent petitions, either before or after criminal proceedings [were] started, summary motions or petitions in criminal cases after indictment or information, independent bills in equity [were] all recognized by the courts as proper." *Goodman* v. *Lane*, 48 F. 2d 32, 35 (C.A. 8), and cases there cited. In view of the novelty and uncertainty as to the appropriate pretrial remedy, it is quite possible that immediate appellate review was held available in some of these cases, at least in part, to underscore and solidify the propriety of the basic procedures followed. Since the courts were not clear as to their own underlying jurisdiction over the suppression proceedings (cf. *Eastus* v. *Bradshaw*, 94 F. 2d 788 (C.A. 5); *United States* v. *Maresca*, 266 Fed. 713 (S.D. N.Y.)), it was a logical step, once such initial jurisdiction was exercised, to vindicate it by holding the resultant order appealable. See *Essgee Co.* v. *United States*, 262 U.S. 151, where, although the petition for return was filed in a criminal case, it was entitled a separate equitable proceeding and treated as such on appeal. Cf. *Dowling* v. *Collins*, 10 F. 2d 62 (C.A. 6).

At present, the right to move to suppress has been codified by Rule 41, F. R. Crim. P., adopted in 1946. Certainly, to the extent that no property rights are involved and the motion is merely to suppress the use of things or information as evidence, there is no reason now why the proceeding should not be treated as it is called, a "motion" in a criminal case. Under general principles of finality, a motion under Rule 6

challenging the composition of a grand jury is an interlocutory motion and an order denying the motion is not appealable until after final judgment. Cf. *Carroll* v. *United States,* 354 U.S. 394, 403; *Parr* v. *United States,* 351 U.S. 513, 518–519. There is no reason why a motion challenging the evidence which may go to a grand jury should not be in the same category with respect to appealability.

In view of the provisions of Rule 41(e) providing for a motion to suppress in the district of trial there is no longer any doubt that the order on such a hearing can be reviewed after final judgment in the criminal case, even if the motion were made before indictment. While, ordinarily, a trial judge will not without new evidence reverse a ruling by another judge of coordinate jurisdiction (see *United States* v. *Wheeler,* 256 F. 2d 745 (C.A. 3), certiorari denied, 358 U.S. 873), it is "the trial court's normal province to pass on the admissibility of evidence." *United States* v. *Klapholz,* 230 F. 2d 494, 497 (C.A. 2), certiorari denied, 351 U.S. 924. Hence, if a defendant's motion to suppress before indictment is denied, he may object to the admissibility of the evidence at the trial and preserve that question for appeal after final judgment.

Closely intertwined with the novelty of the remedy and equitable cast of the relief sought, was the possibility prior to *Cogen* that, unless the order was subject to independent review, principles of *res judicata* might apply to preclude appellate consideration. Cf. *Steele* v. *United States No. 1,* 267 U.S.

498; *Steele* v. *United States No. 2*, 267 U.S. 505. This effect might result for two reasons. First, motions to suppress were being considered as separate equity proceedings. And second, although this Court had held that denial of a pretrial motion to suppress did not *necessarily* foreclose renewal of the application at trial (*e.g., Gouled* v. *United States*, 255 U.S. 298, 303; *Agnello* v. *United States*, 269 U.S. 20, 34–35), this was a radical departure from the general judicial policy forbidding interruption at trial to "permit a collateral issue to be raised as to the source of competent evidence." *Segurola* v. *United States*, 275 U.S. 106, 111–112. Since there was no established procedure, such as there is now, which made it clear that the proceeding for suppression could be renewed as a "motion" in the criminal case even if originally brought before indictment, there was room for belief that the proceeding for suppression, if brought before indictment, was not so related to the criminal case as to be part for it. Hence, the order on the motion could be deemed to have final effect even if an indictment was brought before it was decided.[15]

b. Recent decisions of this Court indicate that the time of indictment is not, in itself, the standard of appealability.—Since the decisions in *Cogen* and *Go-Bart*, this Court has made clear, in *United States* v. *Wallace Co.*, 336 U.S. 793, that the *res judicata* effect, and by implication the appealability, of an

[15] As we point out in our petition for a writ of certiorari in *United States* v. *Koenig*, No. 93, this Term, pp. 10–11, there is a similar problem where the order of suppression is brought in a district other than that of trial.

order on a motion to suppress, must be determined by the practical effect of the order. In *Wallace* the government's motion to require production for use in a civil anti-trust suit of documents which had been previously suppressed in a criminal proceeding was denied by the trial court. In rejecting the claim that the suppression order in the criminal case was *res judicata*, this Court observed that such a conclusion depended on (336 U.S. at 802):

> * * * whether the proceeding was handled by the court as an independent plenary proceeding or one to suppress evidence at a forthcoming trial. For a judgment in an independent plenary proceeding for return of property and its suppression as evidence is final and appealable and the scope of relief in such a case may extend far beyond its effect on a pending trial; but a decision on a motion to return or suppress evidence in a pending trial may be no more than a procedural step in a particular case and in such event the effect of the decision would not extend beyond that case. *Whether a motion is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances.* See *Cogen* v. *United States*, 278 U.S. 221. [Emphasis added.]

Since a motion to suppress which does not ask for return of the property necessarily affects only the use of the evidence at a criminal trial—particularly where the indictment is returned prior to the district court's decision on the motion—it is in practical effect part of the criminal trial and should be treated as such.

Moreover, and more fundamentally, we believe the ruling of the court below in relation to the particular situation presented by this case—*i.e.*, a motion designed only to suppress evidence at an anticipated criminal trial—is contrary to the spirit of this Court's ruling in *Carroll* v. *United States*, 354 U.S. 394. It is true that in the *Carroll* case the Court recognized the earlier decisions which were deemed to make the time the indictment was returned the crucial determinative factor (*id.* at 403–404):

> Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made *prior to indictment* * * *.

But the problem before the Court in *Carroll* was the right of the government to appeal from denial of a motion brought *after* indictment. Therefore the Court had no occasion to consider the issue with which this case is concerned, *i.e.*, whether a motion merely to suppress evidence, brought after preliminary hearing and before indictment, is part of the criminal case.

In basic philosophy, however, the *Carroll* case (as the *Wallace* case before it) seems to us to have outmoded any mechanical test of appealability which rests solely on the question of whether the motion is made before or after indictment. In holding that the government had no right to appeal from an order granting a motion to suppress filed after indictment, this Court pointed out in *Carroll* both that fragmentary appeals are not favored and that appeals by the government in criminal cases are not permitted ex-

cept in the specific instances where Congress has made provisions for such appeals.[16] Moreover, the Court in *Carroll*, quoting from *Cogen* v. *United States*, 278 U.S. 221, 225, stated that the "'essential character and the circumstances under which it is made' determine whether a motion is an independent proceeding or merely a step in the criminal case" (354 U.S. at 404, note 17). It follows, we believe, that where, as a practical matter, the ruling on a motion to suppress, even though brought before indictment, is in effect merely a ruling on evidence at a forthcoming criminal trial, the order is not appealable by either the defendant or the government.

c. *Recent decisions of the courts of appeals have refused to consider the time of indictment as the standard, in itself.*—Until recently, the courts of appeals followed the statement in *Cogen* indicating that the time of indictment alone determines the appealability of an order on a motion to suppress.[17] All the courts

[16] Congress has specifically provided for appeals by the government from grants of motions to suppress in narcotics cases. 18 U.S.C. 1404. This Court had suggested in *Carroll* that, if there is a need for government appeals, it is the function of Congress to decree a departure from "the historical pattern of restricted appellate jurisdiction in criminal cases." 354 U.S. at 407.

[17] *E.g.*, *Cheng Wai* v. *United States*, 125 F. 2d 915 (C.A. 2); *United States* v. *Poller*, 43 F. 2d 911 (C.A. 2); *In re Milburne*, 77 F. 2d 310, 311 (C.A. 2); *United States* v. *Edelson*, 83 F. 2d 404, 405 (C.A. 2); *Lagow* v. *United States*, 159 F. 2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858; *Lapides* v. *United States*, 215 F. 2d 253, 254 (C.A. 2); *In re Sana Laboratories*, 115 F. 2d 717 (C.A. 3), certiorari denied, 312 U.S. 688; *Weldon* v. *United States*, 196 F. 2d 874, 875 (C.A. 9); *Freeman* v. *United States*, 160 F. 2d 69 (C.A. 9).

of appeals, however, have not held, as the statement in *Cogen* would seem to require, that an order is appealable if filed before the indictment even though the indictment is returned before the motion is decided or pending appeal. The Second Circuit in the decision below and in other decisions has held that, if the motion is brought before indictment, the order thereon is appealable, even though an indictment is returned before the order is entered or pending appeal. *In re Sana Laboratories,* 115 F. 2d 717 (C.A. 3), certiorari denied, 312 U.S. 688; *Hoffritz* v. *United States,* 240 F. 2d 109 (C.A. 9), *Freeman* v. *United States,* 160 F. 2d 69 (C.A. 9). On the other hand, other circuits have held that the order is not appealable if the indictment is filed prior to decision of the motion or of the appeal. *United States* v. *Williams,* 227 F. 2d 149 (C.A. 4); *Nelson* v. *United States,* 208 F. 2d 505 (C.A. D.C.); *United States* v. *Mattingly,* 285 Fed. 922 (C.A. D.C.).

Recently, after the decisions of this Court in *Carroll* v. *United States,* 354 U.S. 394, and *United States* v. *Wallace Co.,* 336 U.S. 793 (both of which are discussed, *supra,* pp. 40–43), the Fourth and Fifth Circuits have indicated that the time of the return of the indictment is not the critical factor in deciding the appealability of an order on the motion to suppress and that the motion, even if brought before indictment, may be so involved in a pending criminal proceeding as not to be independently appealable. The Fifth Circuit held that, where the motion is brought after complaint and preliminary hearing and

its purpose is merely to suppress the use of the evidence at the anticipated trial arising out of the complaint, the order on the motion is merely a step in the criminal proceeding then in progress. *Zacarias* v. *United States,* 261 F. 2d 416, certiorari denied, 359 U.S. 935; *Saba* v. *United States,* 282 F. 2d 255, pending on petition for a writ of certiorari, No. 34, this Term. As the court of appeals observed in *Zacarias* (261 F. 2d at 418):

> [W]e think it quite plain that after a complaint has been issued by a United States commissioner, the accused has been afforded a commitment hearing at which he is permitted to cross examine the prosecuting witnesses and to testify, if he so desires, in his own behalf, and is then, in the language of the statute "[h]eld to answer in the district court," a motion thereafter made under Rule 41(e) is incidental to the criminal proceeding already commenced and pending. An order on such motion is not final; it is interlocutory and is not appealable.

Similarly, in *United States* v. *Williams,* 227 F. 2d 149, 151–152 (C.A. 4), in holding that an order determining that a motion made before indictment is not appealable, Judge Parker stated: "we do not think that the time of the finding of the indictment is the sole criterion for deciding whether the proceeding initiated by the motion is plenary or interlocutory. Criminal proceedings were commenced against defendant when he was bound over by the Commissioner and gave bond for his appearance at District Court to answer the charge against him * * *."

The more flexible view of *Zacarias* and *Williams* accords best with the well-established rule against fragmentary appeals, and avoids a rigid formula which precludes intermediate review where the significance and ancillary nature of a particular issue might warrant it. These cases recognize realistically that the pendency of a criminal case does not inevitably depend on whether an indictment has been returned, but upon a number of related considerations. They retain the essence of the general approach of the *Cogen* opinion and conform to the more recently expressed views of this Court.

C. THE CIRCUMSTANCES OF THIS CASE DEMONSTRATE THAT THE MOTION TO SUPPRESS WAS NOT AN INDEPENDENT ACTION BUT SIMPLY A PROCEDURAL STEP IN THE CRIMINAL CASE

As we have contended above, we believe that the decisions of this Court establish that the appealability of orders on motions to suppress depend on a number of circumstances. We do not suggest, however, that numerous factors should be weighed in each case; such a rule would mean that orders would be appealed in order to determine whether they were appealable. The result would be virtually as much delay in trying criminal cases as a rule making orders on motions to suppress freely appealable. Rather, we think that it is important that the courts lay down rules which are easily and clearly applied, at least in the large majority of cases, so that the parties can determine in advance, with reasonable accuracy, whether an order is appealable.

Looking to the "essential character" of the motion in this case and "the circumstances under which it [was] made" (*Cogen* v. *United States*, 278 U.S. 221, 225; see *United States* v. *Wallace Co.*, 336 U.S. 793, 803; *Carroll* v. *United States*, 354 U.S. 394, 404, note 17), we think the conclusion is inescapable that it was simply a procedural phase of the criminal prosecution.

1. Petitioner's motion to suppress asked not for the return but only for the suppression of the material seized incident to his arrest—*i.e.*, "that the Government be estopped from using said items in any criminal proceeding * * *" (R. 6). It did not even incidentally pray for the return of private property or of any items which might have been used by the government in proceedings apart from the prospective criminal trial. Cf. *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2), certiorari denied, 366 U.S. 944; *Centracchio* v. *Garrity*, 198 F. 2d 382, certiorari denied, 344 U.S. 866 (C.A. 1); *Lapides* v. *United States*, 215 F. 2d 253 (C.A. 2). The motion was simply aimed at suppressing the evidence seized—the bulk of which was contrabrand narcotics to which petitioner would not, in any event, be entitled.[18] See *Cogen* v. *United States*, 278 U.S. 221, 227–228; *Thomas* v. *United States*, 128 F. 2d 617 (C.A. 6); *United States* v. *Rosenwasser*,

[18] Although a large amount of money was also seized, and the motion made reference to miscellaneous papers and a passport, there is nothing in this record to indicate that petitioner was seeking anything but an order of suppression (see R. 3–6, 81, 90). As he admitted, these funds were the profits earned in narcotics traffic (R. 10). Compare our Brief in Opposition in *Carlo* v. *United States*, *supra*, No. 908, Oct. Term 1960, pp. 8–9.

145 F. 2d 1015 (C.A. 9). Thus, the "essential character" of the motion revealed that it was meant to be no more than a procedural weapon in the criminal case. It had no other function.

We submit that when the defendant does not claim the return of property or is indisputably not entitled to return (as in the case of contraband such as narcotics, unstamped liquor, and counterfeit money), the motion to suppress is automatically part of the criminal case whenever it is made. Even if—unlike this case—the motion is made, decided, and appealed before even a complaint is filed, we do not see how it can be considered an independent proceeding. For the defendant has no interest whatsoever in the return of the property. His sole purpose in making the motion is to suppress the use of the property in a criminal or forfeiture case, whether such a case is then pending or not. If no case is ever brought or a trial is never held, the denial of the motion to suppress is irrelevant. If a trial is held and the defendant is convicted, the denial of the motion to suppress is reviewable on appeal from the conviction. Thus, a motion to suppress which does not ask for return of the property (or which asks for the return of property to which the movant is clearly not entitled) can never give rise to an independent proceeding which is separately appealable.

2. Even if the Court decides not to apply the clear rule for which we contend—that orders denying motions which do not seek the return of returnable property are never separately appealable—we submit

that, at the least, such orders should not be appealable when they are made after the criminal case has commenced and particularly where they are not decided until after the indictment has been returned.

On March 9, 1959, petitioner was arrested on a federal narcotics charge, and the next day was arraigned on this charge before a United States Commissioner. At the commitment proceeding, petitioner waived preliminary hearing, was released on bail, and was bound over for grand jury action (R. 22–24; see Rule 5, F.R. Crim. P.). Petitioner did not make a motion under Rule 41(e) seeking suppression of the material seized incident to the arrest until June 17, 1959. Thus, a criminal charge had been instituted, and this proceeding was running its normal course at the time petitioner filed the motion. Cf. *Zacarias* v. *United States, supra.* The motion judge plainly considered this particular proceeding as an integral segment of the broader criminal proceeding. In his order denying the motion, he specifically pointed out that the order was "without prejudice * * * to a renewal thereof at the time of trial" (R. 90; see also R. 89).

In short, this is not a case in which the motion was filed in advance of any specific criminal charge having been brought (cf. *Lapides* v. *United States, supra; White* v. *United States, supra*), or where the separateness and independent nature of the motion was plain from the very outset (cf. *Essgee Co.* v. *United States,* 262 U.S. 151), or where a request for return of private property was made (cf. *Centracchio* v. *Garrity, supra*). On the contrary, in this case the

motion was filed only after a criminal charge had been lodged, and all steps in furtherance thereof short of indictment had been timely taken. And the motion was heard and decided after the indictment was filed. By specific direction of the motion judge, petitioner may renew his motion at the time of trial; and if it is then overruled and he is convicted, he may, in the normal order of things, raise the issue on appeal from the final judgment of conviction. Only by disregarding these factors and mechanically applying the return-of-the-indictment rule is there a basis for holding this order appealable. As a practical matter the admonition of *Cobbledick, supra,* 309 U.S. at 325–326, applies here in full measure:

> An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection of a constitutional claim made by the accused in the process of a prosecution must await his conviction before its reconsideration by an appellate tribunal.

3. Since we urge that the time of indictment should not be taken as the critical standard for determining appealability, it is appropriate for us to discuss (and for the Court to consider) what rule should be applied in circumstances (unlike the present case) where the movant does request the return of returnable property. We believe, and have taken the position

previously in this Court, see *supra*, pp. 31–32, note 12), that a motion for return of property to which the defendant is clearly entitled if it was illegally seized, and where he has a substantial property interest in its return (such as the $20,100 in *Carlo* v. *United States*, *supra*, 286 F. 2d 841), is normally appealable if the motion is brought before indictment. If, however, the defendant clearly does not have a substantial property interest in the seized materials (such as documents or copies of documents which he does not need), the motion is obviously directed toward suppression of the evidence at a criminal trial, despite the plea for its return. The order therefore should not be appealable, at least not if the motion is made after the complaint, and particularly if the order comes after the filing of the indictment. If the defendant has a substantial property interest in the seized materials in the event they are not contraband, and the issue whether the materials are or are not contraband is involved in the criminal case,[19] the order should likewise probably be appealable only if made before complaint and determined before indictment. Where the criminal case has already been started by the filing of the complaint prior to the motion, this issue should be considered as part of the criminal case and therefore should not be separately appealable.

We believe that these or similar rules as to appeals from orders determining motions seeking the return of property can and should be applied in cases in-

[19] For example, if there is a question whether currency is counterfeit.

volving those issues. Even though the rules we propose do not have a single standard as applied to all situations—such as the time of filing the indictment—they are sufficiently plain to provide a definite answer in a large proportion of the cases. In any event, regardless of what rule should be applied where the defendant seeks the return of property, the only issue now before the Court concerns motions which do *not* ask that relief. In this situation, the rule we propose is entirely clear and easily applied. Orders on such motions should not be separately appealable, no matter when the motions are filed, since they are obviously part of the criminal case.

II

THE SEARCH AND SEIZURE WERE VALID

On the merits, the issue is whether, as both courts below found, the arrest of petitioner, and the search and seizure incident to it, were valid. It is the government's position that the narcotics agents had probable cause for petitioner's arrest; that neither the five-month period between the acts giving rise to probable cause and the actual arrest (September 1958 to March 1959), nor any other factors surrounding the arrest made it unlawful; and that the scope of the search incident to arrest was reasonable.

A. EVEN THOUGH THE ARREST WARRANT WAS INVALID, PETITIONER'S ARREST MUST BE SUSTAINED SINCE THE ARRESTING OFFICERS HAD PROBABLE CAUSE

The district court held the petitioner's arrest supportable both on the arrest warrant and because the

arresting officers had probable cause (R. 81–89). The majority (R. 96–97) and dissent (R. 105) below, however, agreed that the warrant of arrest was invalid because the supporting affidavit on which it was based (R. 7) did not specify, except in general terms, the grounds of agent Costa's belief that petitioner was guilty of a narcotics offense [20] (see the Statement, *supra*, pp. 7, 9–10). As indicated in our Brief in Opposition (No. 574, Oct. Term 1960, p. 7), we do not challenge the ruling of the court of appeals that the warrant for petitioner's arrest was not supported by a sufficiently specific affidavit. But the technical invalidity of the arrest warrant certainly does not, as petitioner seemingly urges (Pet. Br. 27–29, 32–34), foreclose a finding that the arrest was lawful as based on probable cause. Congress has specifically empowered federal narcotics agents to arrest without a warrant on probable cause. 26 U.S.C. 7607(2), *supra*, pp. 2–3. And this Court has held that, even when law enforcement officers have made an arrest pursuant to a warrant later found to be technically defective, the arrest is nevertheless valid so long as the officers had probable cause. *Stallings* v. *Splain*, 253 U.S. 339, 342; *United States* v. *Rabinowitz*, 339 U.S. 56, 60; *Go-Bart Co.* v. *United States*, 282 U.S. 344, 356; cf. *Giordenello* v. *United States*, 357 U.S. 480, 488.

As both courts below held, the totality of the circumstances in this case demonstrated "probable cause,"

[20] It of course makes no difference as to the validity of the warrant that agent Costa in fact did have probable cause (see *infra*, pp. 53–54).

or in the statutory language "reasonable grounds,"[21] to believe that petitioner had committed a violation of the federal narcotics laws. Both agents Costa and Moynihan had petitioner and Panzarella under close surveillance immediately preceding, during, and after the narcotics transactions of August 26 and September 10, 1958 (see the Statement, *supra*, pp. 4–6). On both these occasions, after Panzarella had agreed to sell heroin to agent Moynihan and had contacted his "connection," agent Costa witnessed Panzarella's meetings with petitioner, and, immediately following such meetings, Panzarella returned with heroin. Indeed, following the September 10th sale, Panzarella informed Moynihan that petitioner was his source of supply. In short, from the happenings of August 26 and September 10, agent Costa—in light of his own observations and the information imparted to him by his fellow agent—could reasonably conclude that petitioner was intimately involved in narcotics transactions. The agent consequently had probable cause for petitioner's arrest. See *Brinegar* v. *United States*, 338 U.S. 160, 175–176; *Draper* v. *United States*, 358 U.S. 307, 313; *Jones* v. *United States*, 362 U.S. 257, 269.

B. AN ARREST IS NOT INVALID MERELY BECAUSE IT IS NOT MADE AS SOON AS THE OFFICERS HAVE PROBABLE CAUSE

1. The narcotics officers were not required to arrest petitioner as soon as they had probable cause to be-

[21] This Court has noted that probable cause and reasonable grounds "are substantial equivalents of the same meaning." *Draper* v. *United States*, 358 U.S. 307, 310, note 3.

lieve that he had violated the narcotics laws. The Fourth Amendment does not, by its terms or by implication, require that the powers of law enforcement officers be exercised at the first opportunity. *Scher* v. *United States,* 305 U.S. 251, 255; *United States* v. *Joines,* 258 F. 2d 471 (C.A. 3), certiorari denied, 358 U.S. 880 (upholding the validity of an arrest pursuant to a warrant, even though executed some twenty-one days after the warrant was issued). While Rule 41(d) of the Federal Rules of Criminal Procedure specifically requires that a search warrant must be executed within ten days, the provisions regarding arrest warrants generally (Rule 4, F.R. Crim. P.) and arrests by narcotics officers on probable cause (26 U.S.C. 2607(2)) impose no such limitation.

As this Court has recognized, strategy is a necessary weapon "in the arsenal of the police officer" (*Sherman* v. *United States,* 356 U.S. 369, 372), and "[s]ome flexibility will be accorded law enforcement officers engaged in daily battle with criminals for whose restraint criminal laws are essential." *United States* v. *Rabinowitz, supra,* 339 U.S. at 65; cf. *On Lee* v. *United States,* 343 U.S. 747; *Olmstead* v. *United States,* 277 U.S. 438, 468. There are many considerations which justify delay of varying periods in the decision as to when "to close the trap." *United States* v. *Rabinowitz,* 339 U.S. 56, 65. For example, despite the existence of valid grounds for arrest, law enforcement agents may decide that an arrest at a particular moment is inopportune because it will jeopardize related phases of a broad investigation (*e.g., O'Neal* v. *United*

States, 105 A. 2d 739, 740 (Mun. Ct. of App. D.C.), affirmed, 222 F. 2d 411 (C.A. D.C.)), or foreclose the discovery and identification of additional confederates and collaborators (*e.g., Carlo* v. *United States,* 286 F. 2d 841 (C.A. 2), certiorari denied, 366 U.S. 944; *Dailey* v. *United States,* 261 F. 2d 870 (C.A. 5), certiorari denied, 359 U.S. 969; cf. *United States* v. *Kancso,* 252 F. 2d 220, 222 (C.A. 2)), or endanger the bodily safety of officers or others (cf. *Leahy* v. *United States,* 272 F. 2d 487 (C.A. 9), writ of certiorari dismissed, 364 U.S. 945). It is not an unusual pattern in narcotics cases, in particular, for the agents to wait until there is a series of repeated illegal acts—any one of which may be sufficient to support an arrest—before making the arrest. See, *e.g., Gore* v. *United States,* 357 U.S. 386; *Blockberger* v. *United States,* 284 U.S. 299; *United States* v. *Volkell,* 251 F. 2d 333 (C.A. 2), certiorari denied, 356 U.S. 962; *Willis* v. *United States,* 271 F. 2d 477 (C.A. D.C.); *Johnson* v. *United States,* 270 F. 2d 721 (C.A. 9); *Dailey* v. *United States, supra; United States* v. *Kancso, supra.* The aim is to catch the major sellers and persons in charge, and delay is often useful for this purpose. In short, delay is a factor which is properly to be considered, together with all other pertinent criteria, in determining the reasonableness of the law enforcement activity. See *Carlo* v. *United States, supra,* 286 F. 2d at 846; cf. *Seymour* v. *United States,* 177 F. 2d 732 (C.A. D.C.).

But delay in and of itself does not show a sinister or insidious police motive either generally or in this

case. Here, as we have seen (pp. 53–54), agent Costa had probable cause to arrest in September 1958, after he had witnessed petitioner's meetings with Panzarella from which Panzarella returned with heroin and after Panzarella had informed another agent that petitioner was his source of heroin. There is no indication that agent Costa forgot this information in the ensuing five months before petitioner's arrest, particularly since the investigation of petitioner continued (R. 25, 28, 75–76). Thus, it seems clear that, despite the delay, agent Costa had probable cause to arrest petitioner at the time the arrest actually was made.

All the indications in the record are that the delay was simply the result of prudent, law enforcement motivated in good faith by a desire to discover the extent and scope of the narcotics enterprise in which petitioner was involved. Cf. *Abel* v. *United States*, 362 U.S. 217, 226–228. As the Assistant United States Attorney explained at the hearing on the motion to suppress (and no evidence was submitted to the contrary), the lapse of time was dictated by the desire "to find out who else was associated with * * * Di Bella in the narcotics traffic * * * " (R. 75–76). The agents were engaged in an investigation into "the possible sale and possession of narcotics in the area of Jackson Heights, Queens" (R. 25, 28). That the five-month investigation apparently failed in this purpose is no basis for holding that it tainted the arrest with invalidity. Just as it is the rule that what a search turns up cannot be used to justify an illegal arrest

(*United States* v. *Di Re,* 332 U.S. 581, 595), so the fact that an investigation proves unsuccessful does not show that the investigation was unreasonable. It would be strange if because their investigation quickly and successfully revealed that petitioner was in narcotics traffic, the agents were either required to reveal their identity to him by an immediate arrest, and thereby defeat the possibility that he could lead them to others involved in the illegal enterprise, or else lose the right to arrest him at all.

C. FEDERAL OFFICERS, WHO HAVE PROBABLE CAUSE TO MAKE AN ARREST, ARE NOT REQUIRED BY THE FOURTH AMENDMENT OR ANY STATUTE TO GET AN ARREST WARRANT EVEN THOUGH THEY HAVE TIME TO DO SO

1. The Fourth Amendment does not require, either in terms or by implication, that, where arresting officers have the right to act on probable cause without a warrant, a warrant must be obtained if there is time to obtain one. At the time of the adoption of the Constitution and ever since, except where the rule has been modified by statute, it has been settled doctrine that an officer of the law, whether in a private dwelling or elsewhere, may arrest on probable cause to believe that a felony has been committed and that the person arrested has committed it. See, *e.g.,* 4 Blackstone, *Commentaries* (Lewis ed. 1900), pp. 292–293; 2 Hawkins, *Pleas of the Crown,* pp. 128–137, 4 Wharton, *Criminal Law and Procedure* (Anderson ed. 1957), pp. 224–247; Wilgus, *Arrest Without a Warrant,* 22 Mich. L. Rev. 541, 673, particularly at 548–

550 and 685–689; *Carroll* v. *United States,* 267 U.S. 132, 156–157; *Kurtz* v. *Moffitt,* 115 U.S. 487, 504; *Commonwealth* v. *Phelps,* 209 Mass. 396, 410 (1911); *Rohan* v. *Sawin,* 5 Cush. (Mass.) 281, 284–285 (1850); *Wakely* v. *Hart,* 6 Binn. (Pa.) 316, 318–319 (1814); *Samuel* v. *Payne,* 1 Doug. K.B. 359 (1780); *Beckwith* v. *Philby,* 6 B. & C. 635 (1827).

As Professor Wilgus makes clear in his article cited above, the power to arrest without a warrant—unlike the power to search without a warrant—preceded the development of the warrant procedure and it was never intended by the framers of the Bill of Rights that the power to arrest without a warrant be supplanted by the warrant procedure. See also, *e.g., Rohan* v. *Sawin, supra; Wakely* v. *Hart, supra; Commonwealth* v. *Phelps, supra; Burroughs* v. *Eastman,* 101 Mich. 419, 423 (1894); *Clark* v. *Hampton,* 163 Ky. 698, 701 (1961). Indeed, the requirement in the Fourth Amendment that warrants be based on probable cause reflects the fact that, in the period immediately preceding the American Revolution, the invasion of personal liberty resulted, not from the conduct of law enforcement officers acting without arrest warrants, but from the abusive use of warrants. Thus, the evil involved in *Entick* v. *Carrington,* 19 How. St. Tr. 1029, arose from a warrant that empowered the executive officers to do that which they could not do without a warrant—*i.e.,* arrest on suspicion without probable cause. Similarly, the writs of assistance were search warrants. Because of these abuses, the Fourth Amendment provided that no warrants should

issue except on probable cause; insofar as it applied to arrest, rather than search warrants, it was designed to make certain that warrants should not be used to authorize arrests which could not be made without a warrant.

The specific issue whether a warrant of arrest must be obtained by a constable when there is time for him to obtain one was raised in the English case of *Davis* v. *Russell*, 5 Bing. 354 (1829). In that case (an action in trespass for assault and false imprisonment) the plaintiff was arrested at her home in late evening on a charge of robbery commited some two months before. The Court of Common Pleas held that a warrant of arrest was not necessary. Chief Justice Best stated (*id.* at 363):

> It has been further contended, that without a warrant from a magistrate a constable has no right to apprehend upon suspicion, unless there be danger of escape if he forbear to apprehend. The law, however, is not so.

Subsequently, he said (*id.* at 365):

> We cannot uphold the notion that a constable is not permitted to go into a house at night to apprehend a person suspected.

Justice Gaselee stated (*id.* at 368):

> As to the point about the probability of escape, none of the authorities cited go the length of saying that the constable cannot detain, except where he has reason to apprehend an escape.

The decision in *Davis*, announced within forty years after the adoption of the Fourth Amendment, reflects the state of the common law at the time that

Amendment was adopted."[11] See also *Samuel* v. *Payne*, *supra*, where the arrest without a warrant also took place in a private dwelling. The same issue was raised in several early American cases and it was similarly held that a warrant of arrest need not be obtained even though there was time to get one. *Rohan* v. *Sawin*, *supra*, 5 Cush. (Mass.) at 286 (1850); *Holley* v. *Mix*, 3 Wend. (N.Y.) 350, 353 (1829); *Wade* v. *Chaffee*, 8 R.I. 224, 225 (1865).

This principle has been recently reaffirmed by this Court. In *Trupiano* v. *United States*, 334 U.S. 699, 704–705, 708, overruled on other grounds, *United States* v. *Robinowitz*, 339 U.S. 56, 66, federal agents arrested the defendant without a warrant in a farmhouse which they had entered, with the consent of the owner, on the ground that he was committing a felony in their presence. The Court held that "[t]he absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances." *Id.* at 705. This holding, however, was based on the fact that a felony was being committed in the officers' presence: "Warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime. These dangers, obviously, are not present where a felony plainly occurs before the eyes of an officer of the law at a place where he is lawfully pres-

[11] The law in England today also permits arrest without a warrant on common law principles or where specifically authorized by statute. See 10 Halsbury, *Laws of England* (3rd ed. 1955), pp. 342–350.

ent." *Ibid.* There is likewise no danger "of unlimited and unreasonable arrests" where the officers clearly have probable cause to believe that a felony has been committed.

In *United States* v. *Rabinowitz,* 339 U.S. 56, the defendant was arrested in a one-room office by officers who had an arrest warrant—and therefore obviously had time to obtain one. The Court, after upholding the arrest on the basis of the warrant, stated that "[e]ven if the warrant of arrest were not sufficient to authorise the arrest for possession of the stamps, the arrest therefor was valid because the officers had probable cause to believe that a felony was being committed in their very presence." *Id.* at 60. And recently in *Abel* v. *United States,* 362 U.S. 217, 236, the Court stated:

> Since a deportation arrest warrant is not a judicial warrant, a search incidental to a deportation arrest is without the authority of a judge or commissioner. But so is a search incidental to a criminal arrest made upon probable cause without a warrant, and under *Rabinowitz,* 339 U.S., at 60, such a search does not require a judicial warrant for its validity.

Petitioner relies on *Jones* v. *United States,* 357 U.S. 493. There a search was made without a warrant and not incident to an arrest. The government argued (for the first time in this Court) that the search was valid because the government agents entered the house lawfully in order to arrest the defendant on probable cause and once in the house could seize contraband in plain sight. *Id.* at 499. This

Court rejected this contention on the ground that the record showed that the officers had entered in order to conduct a search, not to arrest the defendant. *Id.* at 500. But the court did state that, if the government's contentions had been properly presented, they "would confront us with a grave constitutional question, namely, whether the *forceful* nighttime entry into a dwelling to arrest a person reasonably believed within upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment" (emphasis added). *Id.* at 499–500. This issue, however, is likewise not presented in this case for the record is clear that the officers did not enter petitioner's house by force. They announced their presence as officers and were admitted (see *supra*, p. 8). There was simply a peaceable entry followed by an arrest on probable cause—a procedure which, as we have shown, is consonant with Fourth Amendment guarantees.

In short, whatever one's individual judgment as to the desirability or undesirability of allowing law enforcement officers to make arrests without warrants when there is time to get a warrant, it is clear that a right which has been recognized as constitutional at the time of and since the adoption of the Fourth Amendment cannot now be deemed in violation of that Amendment. If changes are to be made, it should be for Congress and not the courts to make them.

2. The statute, which authorizes narcotics agents to arrest on probable cause—26 U.S.C. 7607, *supra*,

pp. 2–3—does not make such a change; it simply confirms that narcotics agents are authorized to perform all enforcement functions necessary to apprehend the narcotics violator and seize the narcotics in his possession. Thus, the statute itself, unlike Rule 41(d) with regard to search warrants, imposes no time limit on the power it confers on narcotics agents to arrest without a warrant.

Moreover, the legislative history of 26 U.S.C. 7607 confirms that Congress did not intend such a limitation. Prior to the adoption of this legislation, the issue was raised in several cases as to whether narcotics agents had the power of law-enforcement officers of the United States, or simply the more restrictive rights of arrest belonging to private persons. See *United States* v. *Jones*, 204 F. 2d 745, 752–754 (C.A. 7), certiorari denied, 346 U.S. 854. It was the prime aim of 26 U.S.C. 7607 to make clear that narcotics agents did have the authority of peace officers of the United States. As Senator Daniel, the sponsor of the bill in the Senate, put it: "The purpose is to give these law-enforcement officers status comparable to that now held by agents of the Federal Bureau of Investigation and other Federal enforcement officers." 102 Cong. Rec. 7284. See also S. Rept. No. 1997, 84th Cong., 2d Sess., p. 11; H. Rept. No. 2388, 84th Cong., 2d Sess., pp. 10, 70; H. Rept. No. 2546, 84th Cong., 2d Sess., p. 14 (Conference Report). Undeniably, as petitioner points out (Pet. Br. 35–36), Congress was concerned that narcotics agents have the authority to act with dispatch to prevent the destruction or removal of readily

disposable narcotics evidence. But the desire of Congress that the enforcement agents be empowered to act quickly and immediately under the necessities of the moment is certainly no basis for concluding that Congress meant to empower these agents to arrest without a warrant *only* in an emergency situation—that they were to have more limited arrest power than other federal enforcement agents.

Accordingly, the courts have uniformly held that the statute gives narcotics agents the same power to arrest as peace officers generally and does not require, in order for narcotics agents to arrest without a warrant, "that an arrest be made immediately following the arresting officer's knowledge of probable cause for arrest." *Dailey* v. *United States,* 261 F. 2d 870, 872 (C.A. 5), certiorari denied, 359 U.S. 969; see *Alvarez* v. *United States,* 275 F. 2d 299, 302 (C.A. 5) ("The statute [26 U.S.C. 7607] does not impose limits of time and the courts will not interpolate such limits"); *United States* v. *Davis,* 281 F. 2d 93, 97 (C.A. 7), reversed on other grounds, 364 U.S. 505; *Carlo* v. *United States,* 286 F. 2d 841, 846 (C.A. 2), certiorari denied, 366 U.S. 944 (three-month delay).

D. EVEN IF ARRESTING OFFICERS ARE GENERALLY REQUIRED TO GET A VALID WARRANT IF THEY HAVE TIME, THEIR FAILURE TO DO SO IN THIS CASE DID NOT RENDER THE ARREST INVALID

We have contended above (pp. 58–63) that the Fourth Amendment does not forbid officers to arrest on probable cause merely because they had time to get an arrest warrant. We have shown, we believe, that this

was the assumption of the framers of the Constitution and American and English courts since that time. In this section we assume *arguendo,* however, that the Court may decide to pass over the teachings of history and require arresting officers to get a warrant if they can do so. Nevertheless, we submit that petitioner's arrest was valid.

As we interpret the Fourth Amendment and its history, an officer can make an arrest without a warrant if he has probable cause to believe that a felony has been committed (as well as if a felony or misdemeanor is being committed in his presence). A court, as the Fourth Amendment expressly states, can likewise issue an arrest warrant only on the basis of probable cause. If probable cause is lacking when either method of arrest is used, the arrest is invalid and any search and seizure made incident to it is illegal. Thus, no greater *substantive* protection is afforded by a rule requiring arresting officers to get a warrant if possible; the test would still be probable cause. To put the problem into the context of this case, agent Costa was entitled to get an arrest warrant, on the basis of probable cause, by going through the necessary formalities.

Thus, it can readily be seen that the purpose of a rule requiring officers to get an arrest warrant would not be to impose a higher standard on officers making arrests. On the contrary, the purpose of the rule would be to require officers to seek the decision of judicial officials that they have probable cause, rather than making the decision on their own. Presumably,

the decision of the judicial officials will be more accurate and therefore fewer illegal arrests will result. Cf. *Trupiano* v. *United States,* 334 U.S. 699, 705; *United States* v. *Lefkowitz,* 285 U.S. 452, 464; *Jones* v. *United States,* 362 U.S. 257, 270–271; *United States* v. *Walker,* 246 F. 2d, 519, 527–528 (C.A. 7).

If, as we believe clear, the purpose of a rule requiring officers to get warrants if they have time to do so would be to require a decision by a judicial officer, we submit that the arrest here was legal. The arresting officer went to a Commissioner and received an arrest warrant. This is precisely the act which the rule would be intended to encourage. As it happened, the warrant was defective because the supporting affidavits were not specific enough to disclose the probable cause which the arresting officer in fact had (see *supra,* pp. 7, 53–54). This Court, however, has held that, if an arrest is made on the basis of a warrant and the warrant is defective, the arrest is legal when based on probable cause (see the cases cited *supra,* p. 53). Thus, the arrest is legal unless the rule (which we have assumed *arguendo*) that officers must get an arrest warrant if they have time overrules these cases—that is, that this rule means that the officers must get a valid warrant and if the warrant ultimately is decided to be invalid, an arrest made even on probable cause is illegal.

We submit that, even if the rule requiring use of arrest warrants is adopted by the Court, no purpose is served by extending the rule to cover cases such as this one when the officers have in good faith gotten

a warrant (see *infra*, pp. 68-72). Obviously, it cannot encourage greater use of the warrant procedure. Officers cannot be expected to review a Commissioner's decision to issue a warrant and then to seek a new warrant if they decide the first warrant was defective. Nor would a rule covering the situation involved in this case substantially encourage officers to be more careful in proving probable cause before the Commissioner. While some officers are undoubtedly tempted to determine probable cause for themselves rather than to take the time and trouble to get a warrant, when they do attempt to get a warrant little additional time or trouble is needed to submit an affidavit which does provide enough facts to show probable cause instead of one which does not.[22]

A mistake in the amount of specificity in the affidavit is essentially technical and harmless as long as the officer in fact had probable cause but merely failed to describe his information adequately. There can be no purpose in penalizing the government and ultimately the public for such a technical mistake made in good faith by the Commissioner who issues the defective warrant, and the enforcement officer, when the mistake is basically harmless.

In short, even if arresting officers are required to get a warrant if they have time, this rule should not be applied to the situation where the officers have gotten a warrant although it is defective. Instead, we submit, the rule already enunciated by this Court

[22] We assume, of course, that the officer has probable cause. If he does not, the arrest will be invalid under any rule.

should be reaffirmed—that if officers make an arrest on the basis of a warrant which is determined to be defective, the arrest is valid if based on probable cause.

E. THE TOTALITY OF CIRCUMSTANCES IN THIS CASE DOES NOT SUGGEST THAT THE ARREST WAS MADE IN BAD FAITH AS AN EXCUSE TO SEARCH OR WAS OTHERWISE INVALID

Petitioner argues that the totality of the circumstances in this case shows that the arrest was made in bad faith as an excuse to search and was unreasonable. This contention is without merit.

1. About a month after the September 10 transaction, on October 15, 1958, agent Costa applied for and obtained a warrant for petitioner's arrest, even though there was no constitutional or statutory requirement (see *supra*, pp. 58–65). The fact that the arrest warrant was invalid because of a technically defective complaint does not indicate that the agent had no basis for the arrest; rather it indicates only that agent Costa, through inadvertence, failed to submit all of his information to the issuing Commissioner. As we have shown (pp. 53–54) and both courts below have held, the arresting officer clearly had probable cause.[24] In terms of the underlying purpose and intent of the agents, the application for an arrest warrant reveals that they were acting in good faith when they decided to arrest petitioner.

---

[24] Petitioner's reliance (Pe . Br. 23, 25–26, 41) on decisions that hold searches unlawful which were made after arrests found not to be based on probable cause is therefore misplaced. *Johnson* v. *United States*, 333 U.S. 10; *McDonald* v. *United States*, 335 U.S. 451.

2. Petitioner claims (Pet. Br. 25–26, 42–44) that the five-month hiatus between the facts giving rise to probable cause and the arrest shows an improper motive. We have seen, however (pp. 55–57), that the record does not even suggest that the delay was dictated by other than relevant and reasonable law enforcement considerations. Such considerations are directly relevant on the issue whether the officers are acting in good faith. See *Abel* v. *United States, supra,* 362 U.S. at 226–228.

3. There is no evidence that petitioner was arrested as a subterfuge to search his home. The place where petitioner lived was of course the most likely place to find him. No doubt the agents did contemplate a search of the premises for narcotics as an incident to petitioner's arrest, if he were arrested at home. Since the agents had good reason to believe that petitioner was dealing in narcotics, they unquestionably would have searched him and the premises where he was found wherever he was arrested. Indeed, such an ancillary purpose is undoubtedly present in almost every situation where the alleged criminal is arrested in his home, place of business, or automobile, and the courts have never invalidated a search and seizure on this ground. Indeed, they have specifically held that the fact that the agents had as an ancillary purpose the intent to search the premises does not taint the arrest and the incidental search with illegality if the arrest was otherwise lawful. See *Williams* v. *United States,* 273 F. 2d 781, 794 (C.A. 9), certiorari denied, 362 U.S. 951; *Donahue* v. *United States,* 56 F. 2d 94, 97 (C.A. 9).

The fact that an application for a nighttime search warrant had previously been denied on October 6 does not, as petitioner suggests (Pet. Br. 26, 28), show that the arrest was a subterfuge to search. The record does not support petitioner's assumption that the agents were denied a search warrant by the Commissioner because they failed to establish probable cause for a search of the premises. On the contrary, from what appears in the record (see the Statement, *supra*, p. 6, note 4), the Commissioner denied their application under the assumption that, in order to obtain a warrant to search at night, the officers had to establish *postively* that the contraband they wanted to seize was on petitioner's premises, as required by Rule 41(c), F.R. Crim. P. (R. 73).[25] The agents were using the general form under Rule 41(c), even though, as to narcotics, 18 U.S.C. 1405(1) provides that "a search warrant may be served at any time of the day or night if the judge or the United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist * * *." Thus, it may well have been that the inclusion of the restrictive phrase "night time search warrant" in the agents' affidavits (R. 27, 31), and their failure to refer to 18 U.S.C. 1405(1), led to the denial of the application.

In any event, whether the failure of the agents to draw 18 U.S.C. 1405(1) to the attention of Commissioner Abruzzo led to his denial of the application for a search warrant, or whether, as petitioner urges,

[25] The affidavits for the search warrant rested only on probable cause (R. 25, 28).

the Commissioner found no probable cause for its issuance, the denial of the application for the search warrant does not affect the validity of the arrest, and the search incident to it. Issuance of a search warrant depends on evidence that the *premises* to be searched contain stolen, embezzled, or contraband property. See Rule 41(a), F.R. Crim. P. On the other hand, probable cause for arrest depends solely on the question whether " 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Draper* v. *United States,* 358 U.S. 307, 313; see also Rule 4(a), F.R. Crim. P. Thus, Commissioner Abruzzo made no ruling on the distinct issue whether probable cause existed for an arrest since no such ruling was called for. But even if he had made such a ruling, it would have been erroneous; agent Costa had probable cause (see *supra,* pp. 53–54) and, therefore, the arrest and search incident to it were valid.

4. The place, method, and time of arrest were also completely reasonable. As we have noted, petitioner's residence was the most obvious place for the agents to find him. The agents went to the door of petitioner's apartment only after they had observed that he was there (R. 9, 76). The agents rang the doorbell, and, when the door was opened by petitioner's step-daughter, they immediately identified themselves and showed her their credentials. She ushered them into the apartment and they asked to see petitioner.

When he appeared, he was immediately placed under arrest. Thus, access to petitioner's apartment was gained peaceably, after the agents had announced their authority.[26] And there was, as we will show below (pp. 79–81), no general search for evidence but a reasonable search for contraband narcotics in which the agents had good reason to believe that petitioner was dealing.

Petitioner's argument gains no strength from the fact that the arrest occurred in his apartment at approximately 8:15 p.m. in the evening. This was a reasonable hour. Moreover, this Court has never held that the validity of a search, incident to a lawful arrest, is determined by the time or place that it is made. It has refused to hold a search incident to a lawful arrest unreasonable simply because it is made in private premises during a particular time.[27] See, *e.g.*, *Abel* v. *United States*, 362 U.S. 217, 222, 234–236 (arrest at about 7:00 a.m. in petitioner's hotel room which was his permanent residence); *Harris* v. *United States*, 331 U.S. 145, 151 (arrest and search of a home); *Agnello* v. *United States*, 269 U.S. 20, 30 (arrest and search of a home); cf. *United States* v. *Rabinowitz*,

[26] There is thus no problem of forcible entry as was involved in *Miller* v. *United States*, 357 U.S. 301, and suggested as presenting a problem in *Jones* v. *United States*, 357 U.S. 493, 499–500 (see *supra*, pp. 62–63).

[27] While it is true that Rule 41(c), F.R. Crim. P., provides more stringent requirements for the issuance of a nighttime as opposed to a daytime search warrant, no similar difference exists under Rule 4 which provides for arrest warrants, or under the statute (26 U.S.C. 7607(2)) which authorized the officers here to arrest on probable cause.

339 U.S. 56.[28] Therefore, while it may be true that stricter requirements of reasonableness are applied where a private dwelling is searched (*Davis* v. *United States*, 328 U.S. 582, 592), "[i]t is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises is subjected to search." *Harris* v. *United States*, 331 U.S. 145, 151.

F. THE SEARCH AND SEIZURE INCIDENT TO PETITIONER'S ARREST WERE VALID AND REASONABLE

1. It is established that a reasonable search of the premises under the control of a person arrested on probable cause *without a warrant* is valid under the Fourth Amendment. See *Weeks* v. *United States*, 232 U.S. 383, 392; *Agnello* v. *United States*, 269 U.S. 20, 30; *Carroll* v. *United States*, 267 U.S. 132, 158; *Harris* v. *United States*, 331 U.S. 145; *United States* v. *Rabinowitz*, 339 U.S. 56; *Abel* v. *United States*, 362 U.S. 217. Thus, in *Weeks* v. *United States*,

[28] Searches incident to lawful arrests in private dwellings have also been upheld in the courts of appeals. See, *e.g.*, *United States* v. *Garnes*, 258 F. 2d 530 (C.A. 2), certiorari denied, 359 U.S. 937 (arrest in apartment after midnight); *Hopper* v. *United States*, 267 F. 2d 904 (C.A. 9) (arrest in apartment at about 10 p.m.); *United States* v. *Volkell*, 251 F. 2d 333 (C.A. 2), certiorari denied, 356 U.S. 962; *Smith* v. *United States*, 254 F. 2d 751 (C.A. D.C.), certiorari denied, 357 U.S. 937; *Jennings* v. *United States*, 247 F. 2d 784 (C.A. D.C.); *Johnson* v. *United States*, 270 F. 2d 721 (C.A. 9); *United States* v. *Burgos*, 269 F. 2d 763 (C.A. 2), certiorari denied, 362 U.S. 942; *Morton* v. *United States*, 147 F. 2d 28 (C.A. D.C.), certiorari denied, 324 U.S. 875; *Shew* v. *United States*, 155 F. 2d 628 (C.A. 4), certiorari denied, 328 U.S. 870.

supra, the Court recognized the right to search for instrumentalities of crime incident to arrest as a separate well-established category, independent of the right to search the person. The Court said that the case before it was not "the case of burglar's tools or other proof of guilt found upon his arrest within the control of the accused." 232 U.S. at 392. In *Agnello* v. *United States, supra*, where contraband narcotics were seized in the home of one Alba following an arrest based on probable cause, this Court said (269 U.S. at 30):

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. * * * The legality of the arrests or of the searches and seizures made at the home of Alba is not questioned. Such searches and seizures natural and usually appertain to and attend such arrests.

And in *Carroll* v. *United States, supra*, it was held that a search warrant was not necessary to justify the search of a moving vehicle if the searching officer had probable cause to believe that the contents of the automobile were offending the law. In the course of that opinion, this Court observed (267 U.S. at 158):

> When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have

> and which may be used to prove the offense may be seized and held as evidence in the prosecution.

The doctrine of *Agnello, Carroll,* and *Weeks* was recently given renewed vitality in *Harris* v. *United States,* 331 U.S. 145, *United States* v. *Rabinowitz,* 339 U.S. 56, and *Abel* v. *United States,* 362 U.S. 217. In *Harris,* a search of a four-room apartment incident to a lawful arrest there, was upheld as reasonable. The Court said (331 U.S. at 151):

> The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control."

In *Rabinowitz,* which involved a search of a one-room business place, incident to a lawful arrest, the Court stated (339 U.S. at 60):

> Of course, a search without warrant incident to an arrest is dependent initially on a valid arrest. Here the officers had a warrant for respondent's arrest which was, as far as can be ascertained, broad enough to cover the crime of possession charged in the second count, and consequently respondent was properly arrested. ***Even if the warrant of arrest were not sufficient to authorize the arrest for possession of the stamps, the arrest therefor was valid because the officers had probable cause to believe that a***

" Although the arrest in *Harris* was under a warrant there is nothing in that opinion to indicate that a different rule would have obtained if the arrest was on probable cause.

> *felony was being committed in their very presence.* [Emphasis added.]

And in *Abel*, where the Court held that the search of living quarters incident to the arrest there on a deportation warrant was reasonable, the Court acknowledged the present vitality of the *Rabinowitz* rationale. In answer to the argument that the search was unreasonable because the deportation warrant of arrest was issued without judicial intervention or approval, the opinion observed (362 U.S. at 236):

> But so is a search incidental to a criminal arrest made upon probable cause without a warrant, and under *Rabinowitz*, 339 U.S., at 60, such a search does not require a judicial warrant for its validity.

See also *Henry* v. *United States*, 361 U.S. 98, 102.

Although it is true that there have been "strong and fluctuating differences of view" in search and seizure cases (*Abel* v. *United States*, *supra*, 362 U.S. at 235), these differences have not been based on the absence of an *arrest* warrant, but have arisen from divergent opinions as to the permissible range of search and the legality of seizure without a *search* warrant incident to a lawful arrest, regardless of whether the arrest was based on probable cause or on a warrant.[20] None of the cases in which the Court has

---

[20] See, *e.g.*, the majority and dissenting opinions in *Davis* v. *United States*, 328 U.S. 582, 594; *Harris* v. *United States*, 331 U.S. 145, 155; *United States* v. *Rabinowitz*, 339 U.S. 56, 68; compare *Marron* v. *United States*, 275 U.S. 192, and *United States* v. *Trupiano*, 334 U.S. 699, with *Go-Bart Co.* v. *United States*, 282 U.S. 344, and *United States* v. *Lefkowitz*, 285 U.S. 452.

held searches incident to valid arrests illegal has been determined on the basis supporting the arrest. Thus, in *Trupiano* v. *United States,* 334 U.S. 699, it was not the absence of an arrest warrant which led the court to overturn the search based on the arrest as unreasonable; even though the arrest was valid, the Court held that the lack of a search warrant, where concededly there was ample time to obtain one, made the search illegal.[21] Similarly, the searches and seizures in *Go-Bart Co.* v. *United States,* 282 U.S. 344, and *United States* v. *Lefkowitz,* 285 U.S. 452, were not held unreasonable because the search and seizure were incident to a warrantless arrest—indeed in *Lefkowitz* the arrest was pursuant to a valid arrest warrant. The Court held the searches unreasonable because of their broad range and scope. The officers in those cases did not enter the business premises to make an arrest, but rather "conduct[ed] a general exploratory search for merely evidentiary materials tending to connect the accused with some crime." *Harris* v. *United States, supra,* 331 U.S. at 153. These actions were condemned as "general exploratory searches, which cannot be undertaken by officers

[21] Writing for the Court, Mr. Justice Murphy expressly made clear that, although the arrest without a warrant was valid, it did not justify the search without a warrant to search. See 334 U.S. at 704–705, 708. There is no intimation in his opinion that a different result would have been reached had an arrest warrant been obtained.

And "[t]o the extent that [*Trupiano*] * * * requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest," it has been overruled by *United States* v. *Rabinowitz, supra,* 339 U.S. at 66.

with or without a warrant." *United States* v. *Rabinowitz, supra,* 339 U.S. at 62.

In short, unless this Court is ready to overrule the *Harris* and *Rabinowitz* cases (which neither the dissenting judge below nor petitioner suggests), the search in this case was valid (if reasonable in scope and method) since the arrest on which it was based was valid. It cannot be held, consistently with those rulings, that, as a matter of law, a search and seizure incident to a lawful arrest—whether based on probable cause or a warrant—is invalid because it occurred in private premises and was without a search warrant. Under the prevailing principle of this Court, "[t]he relevant test is not whether it is reasonable to procure a search warrant but whether the search was reasonable." *United States* v. *Rabinowitz, supra,* 339 U.S. at 66.[32]

2. The search and seizure in this case were reasonable in scope and method. On the government's version of the events (as submitted to the motion judge), immediately following petitioner's arrest he was asked whether he would agree to a search of his premises. He responded that he knew what the agents were seeking and continued: "I have all the stuff in a suitcase in the

[32] As this Court said in *United States* v. *Rabinowitz, supra,* 339 U.S. at 63: "What is a reasonable search is not to be determined by any fixed formula. * * * The recurring questions of reasonableness of searches must find resolution in the facts and circumstances of each case." See also *Harris* v. *United States, supra,* 331 U.S. at 150; *Go-Bart Co.* v. *United States, supra,* 282 U.S. at 357.

[33] At this point petitioner produced a locked metal box containing $2,675 in cash.

closet. There's no use tearing the place apart." (R. 10, 77). Thereupon he took the agents into his bedroom (the arrest had been made in his living room) and pointed to a closet from which agent Costa removed a suitcase in which he found about one pound of heroin, a quantity of cocaine and paraphernalia used to "cut" narcotics (R. 10). The agents, after requesting petitioner to take possession of his valuables,[34] conducted a search of the apartment which turned up $6,000 in cash in a shoe box found hidden in petitioner's closet. Petitioner, on the other hand, denied that he had consented to the search, asserting by way of his counsel's affidavit that he had never given money or narcotics to the agents and that, following his arrest, he remained in the living room while the agents searched his apartment (R. 34).

Whether or not the search derived from petitioner's consent or was merely an incident to his lawful arrest, it was wholly reasonable.[34] There is nothing to indicate that it even approached the duration or extent of the searches that this Court upheld in *Harris* v. *United States, supra,* where the defendant's four-room apartment was searched by five agents for approximately five hours, and *Agnello* v. *United States, supra,* where a four-room apartment was searched.[34] Cf. *Abel* v. *United States, supra,* and *United States* v. *Rabinowitz, supra.* Admittedly, the facts in this case

---

[34] As the majority below concluded: "Under either version it does not appear that the search of [petitioner's] apartment was an unreasonable one" (R. 95–96, note 1).

[34] See Record in No. 6, Oct. Term, 1925, pp. 62, 129, 219.

as to the duration and extent of the search are not entirely clear in either the government's or petitioner's versions of the arrest, the search and the seizure. It was petitioner's burden, however, to present at least a *prima facie* case that the search was unreasonable. Insofar as the evidence is vague, he has failed to sustain this burden. But, in any event, the record strongly indicates that the search was quite limited, both in scope and duration.

It is clear that there was not in this case the exploratory and indiscriminate ransacking of the "entire contents" of a house, including an exhaustive number of items obviously having no bearing or connection at all with the particular crime for which the defendants were arrested, which invalidated the seizure in *Kremen* v. *United States,* 353 U.S. 346, 349–359. Nor was there the sweeping search and seizure of private papers which marked the search in *Go-Bart* and *Lefkowitz, supra;* cf. *Gouled* v. *United States,* 255 U.S. 298, 308–310. The items seized as a result of this particularized search (contraband narcotics, the tools for its use, and the profits of petitioner's involvement in the narcotics traffic) were the instrumentalities and fruits of the crime for which petitioner was arrested. And since contraband, although not the subject of the original search, is properly subject to seizure if accidentally discovered in the course of a valid search (*Harris* v. *United States, supra*), *a fortiori* the items involved here, which were intimately related to the same crime for which petitioner was arrested, were properly seized by the agents.

CONCLUSION

If the Court agrees with the government's contention discussed in Point I, *supra*, pp. 21–52, that the order denying the motion to suppress was interlocutory and nonappealable, then the judgment below should be vacated and the cause remanded with directions that the appeal be dismissed. If the Court believes that the order was independently appealable, then, for the reasons set forth in Point II, *supra*, pp. 52–81, it is submitted that the judgment below should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BRUCE J. TERRIS,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

OCTOBER 1961.

U. S. GOVERNMENT PRINTING OFFICE: 1961